Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

NATIONAL TITLE RESOURCES CORPORATION, a Minnesota corporation, and JOEL M. HOLSTAD,
Petitioners,

vs.

FIDELITY NATIONAL TITLE INSURANCE COMPANY OF NEW YORK, a New York corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does a district court commit reversible error when, on summary judgment, it engages in evaluative judgment between two rationally possible conclusions from the facts of a case?

II. When there is a conflict between the judge and the jury, does the Re-examination Clause of the Seventh Amendment to the United States Constitution dictate that an appellate court conduct a "more searching inquiry" into whether the trial judge abused his discretion in granting a new trial?

PARTIES

The names of all the parties to the proceedings in the court below appear in the caption of this case.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, National Title Resources Corporation, a Minnesota Corporation, states the following:

> National Title Resources has no parent company, and no publicly owned company owns 10% or more of its stock. National Title Resources Corporation is no longer in existence.

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DECISIONS BELOW

The opinion of the federal district court is not reported. The decision of the Eighth Circuit Court of Appeals is reported at 261 F.3d 758 (8th Cir. Ct. App. 2001).

JURISDICTION

The Eighth Circuit Court of Appeals submitted its decision on August 12, 2001. The decision was filed on August 16, 2001. This Court has jurisdiction under 28 U.S.C § 1254(1).

CONSTITUTIONAL PROVISIONS AND FEDERAL RULES INVOLVED

The Seventh Amendment to the United States Constitution provides as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

Federal Rules of Civil Procedure 49(a) provides in pertinent part:

> The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury

retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

Federal Rules of Civil Procedure 50(b) provides in pertinent part:

> If for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment—and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:
>
> (1) if a verdict was returned:
>
> (A) allow the judgment to stand,
>
> (B) order a new trial, or
>
> (C) direct entry of judgment as a matter of law.

Federal Rules of Civil Procedure 56(c) provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Federal Rules of Civil Procedure 59(a) provides in pertinent part:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States ....

STATEMENT OF THE CASE

This case was originally brought in United States Federal District Court, District of Minnesota, under the Court's diversity jurisdiction, 28 U.S.C. § 1332.

A. Facts

On July 1, 1994, Appellant National Title Resources Corp. ("National") and Appellee Fidelity National Title Insurance Co. ("Fidelity") entered into an Issuing Agency Agreement ("Agency Agreement") for the purpose of issuing title insurance.[1] Under the Agency Agreement, National, a title insurance agent, issued title insurance policies underwritten by Fidelity, performed closing operations, and managed funds it collected for Fidelity.

In late 1994, Fidelity sent an auditor, Paul Huntsinger, to National to conduct an audit of National's escrow accounts. Huntsinger purported to have found problems with nonpayment of premiums and escrow shortages and ordered the closing of National's escrow account. Appendix at A-2.

On March 29, 1995, an agreement ("March 29, Agreement") was reached between Fidelity and National

[1] The July 1st Issuing Agency Agreement represented a continuation of the relationship between National and Fidelity, which had commenced pursuant to a June 6, 1992 Agreement.

regarding all allegations of escrow shortages and nonpayment of premiums, allowing National and Fidelity to continue their business relationship. Appendix at A-49. As part of the March 29, Agreement, Fidelity agreed to forego its right to immediately terminate the Agency Agreement provided that National adhered to the terms of the new agreement. Appendix at A-44-48 and A-64-67.

On June 20, 1995, Fidelity terminated the Agency Agreement without notice and commenced an action against National and its president, Joel Holstad. Appendix at A-2.

B. Decisions Below

Fidelity filed suit in the Federal District Court, District of Minnesota, on September 13, 1995. Fidelity asserted claims of breach of contract, negligence, conversion, and breach of a personal guarantee. Appendix at A-2. In turn, National counterclaimed, alleging various torts and breaches of contract by Fidelity. Id.

1. The Federal District Court, District of Minnesota

The district court conducted a jury trial on the parties' claims from June 8, 1998 to June 25, 1998. At the close of the trial, pursuant to Fed. R. Civ. P. 49(a), the lower court submitted a special verdict form to the jury. Appendix at A-36-42. The special verdict form required the jury to determine: 1) whether National breached the Agency Agreement; 2) whether National or Joel Holstad breached the March 29, 1995 Agreement; 3) whether Fidelity breached the Agency Agreement; 4) whether Fidelity breached the March 29, 1995 Agreement; 5) whether National was negligent in the seven above-listed real estate transactions; 6) whether Ed Oesch acted solely as Fidelity's agent and whether he was negligent; and 7) whether National converted property

belonging to Fidelity. Id. Upon finding liability, the special verdict form required the jury to assess damages. Id.

The jury rendered its verdict on June 30, 1998. The jury found that both National and Fidelity had breached the Agency Agreement. Appendix at A-36-42. It awarded damages to Fidelity in an amount of $233,781.11, and to National in an amount of $566,000.00. Appendix at A-37. The jury also found that Fidelity had breached the March 29, Agreement, and that National had not breached the March 29, Agreement. Appendix at A-37-38. No damages were awarded to National for Fidelity's breach of the March 29, Agreement. Id. With respect to the negligence claims against National, the jury found that National was negligent in its handling of four transactions, and not negligent in its handling of three other transactions. Appendix at A-39. The jury awarded Fidelity damages for National's negligence in an amount of $208, 867.77. Id. The jury also found that National did not convert property belonging to Fidelity and that Ed Oesch did not act as an agent solely for Fidelity. Appendix at A-40-42.

Fidelity subsequently brought a post-trial motion for judgment as a matter of law, or in the alternative, for a new trial. Pursuant to a September 24, 1998 Order, the lower court denied Fidelity's motion for judgment as a matter of law because Fidelity had failed to move for a judgment as a matter of law "at the close of all the evidence" under Fed. R. Civ. P. 50(b). Appendix at A-18-23. The court did, however, grant Fidelity's motion for a new trial. Appendix at A-23-34. The court found that Fidelity was entitled to a new trial on the basis of 1) irreconcilable inconsistency in the jury verdict, and 2) because the verdict was against the great weight of the evidence. Appendix at A-25-27. The court also vacated the judgment in favor of National and granted Fidelity's motion for a new trial on damages, concluding that the evidence did not support the damage award to National. Appendix at A-28-34. The court's Order granting a new trial limited the

issues before the court to whether Fidelity breached the termination provisions in the Agency Agreement when it terminated National, and what damages, if any, National suffered as a result of that breach. Appendix at A-34. The court let stand the jury verdicts finding that Fidelity breached the March 29, Agreement, that National did not breach the March 29, Agreement. Appendix at A-31-32. The court's Order also granted Fidelity's motion for attorneys' fees in an amount of $98,655.95 plus interest. Appendix at A-32-34.

In its April 7, 2000 Memorandum Opinion and Order, the district court, on cross-motions for summary judgment, denied National's motions for an order reinstating the jury verdict and for summary judgment on Fidelity's claim for attorneys' fees. Appendix at A-11. The court granted Fidelity's motion for summary judgment on its breach of contract claim and dismissed National's counterclaim with prejudice. Id.

2. The Eighth Circuit Court of Appeals

In its August 16, 2001 Opinion, the Eighth Circuit Court of Appeals, citing Leichiman v. Pickwick, Int'l, 814 F.2d 1263, 1267 (8th Cir. Ct. App. 1987), *cert. denied*, 484 U.S. 855 (1987), upheld the lower court's decision to order a new trial on the issue of breach of the Agency Agreement on the grounds that the jury verdict "was seriously erroneous and a miscarriage of justice." Appendix at A-53-57. The court also upheld the award of attorneys' fees to Fidelity. Appendix at A-57. The court of appeals did not review the trial court's grant of a new trial on the issue of damages.

REASONS FOR GRANTING THE WRIT

At the heart of this contentious case lies an unresolved genuine factual dispute concerning the intention of the parties with respect to entering into the March 29, Agreement. In

particular, the case turns upon whether the parties intended that in executing the March 29, Agreement Fidelity would indefinitely forego its right to "immediately" terminate the Agency Agreement without notice based on an event of default provided that National lived up to its part of the March 29, Agreement. Because a jury has already found that only Fidelity committed post-March 29 breaches, a factual finding on this issue in National's favor would entitle National to damages for Fidelity's breach of the Agency Agreement and cause the district court to reconsider the issue of attorneys' fees under the terms of the Agency Agreement.

The primary purpose of the Seventh Amendment to the United States Constitution is to preserve the historic line separating the province of the jury from that of the judge. When the lower court took away the jury verdicts in this case in the manner that it did, it transgressed into the province of the jury. Granting petitioner's writ of certiorari provides the Court with an opportunity to rectify the lower court's transgression by either reversing and remanding this case or simply reinstating the jury verdicts.

I. WHETHER THE AGENCY AGREEMENT WAS MODIFIED AND WHETHER FIDELITY WAIVED ITS RIGHT TO "IMMEDIATE" TERMINATION HINGES ON DISPUTED FACT ISSUES SO THAT SUMMARY JUDGMENT WAS NOT WARRANTED

In its rush to reach summary judgment, the trial court overlooked genuine issues of fact. The fundamental maxim remains that on a motion for summary judgment the court cannot try issues of fact, it can only determine whether there are issues to be tried. According to Fed. R. Civ. P. 56, summary judgment is appropriate if, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Interpreting this standard, this Court has recognized that summary judgment is inappropriate, "[I]f reasonable minds could differ as to the import of the evidence." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). The Eighth Circuit previously adopted a formulation of the same standard, stating:

> Evaluative judgment between two rationally possible conclusions from facts cannot be engaged in on summary judgment. Only where the facts supportive of a summary judgment can be held to so unambiguously established the actualities of a situation as to leave no basis of substance for dispute as to their reality or as to the conclusion required from them is a summary judgment entitled to be entered.
>
> Chenette v. Trustees of Iowa College, 431 F.2d 49, 53 (8th Cir. 1970); see also Snyder v. United States, 717 F.2d 1193, 1195 (8th Cir. 1983).

Moreover, the fact that the Plaintiff and Defendants filed cross-motions for summary judgment does not mean that either party agreed that the opposing motion should be granted if its own motion were denied; "[T]he well-settled rule of law is that cross-motions for summary judgment do not warrant the court in granting summary judgment unless one of the moving parties is entitled to judgment as a matter of law upon facts that are genuinely not disputed." 6 *Moore's Federal Practice* ¶ 56.13, pp. 56-171 (1996).

Summary judgment was clearly inappropriate in this matter because the evidence concerning the parties' intent with respect to termination of the Agency Agreement, in light of the March 29, Agreement, presents conflicting "rationally

possible conclusions."[2] One "rational possibility" is the interpretation—advanced by Fidelity and chosen by the trial court—that the March 29, Agreement only indicated an intention on the part of Fidelity to refrain from terminating the Agency Agreement that day. Appendix at A-46, and A-64. Yet, in the context of the events surrounding the March 29, Agreement and National's clear desire to continue as an issuing agent for Fidelity, another plausible interpretation of the March 29, Agreement is that Fidelity would not immediately terminate the Agency Agreement unless National breached the new Agreement or committed a new breach of the Agency Agreement.

Fidelity's argument that it only agreed not to terminate the Agency Agreement on "that day" runs afoul of its own admission as to the meaning of the March 29, Agreement and is entirely inconsistent with the continuing relationship contemplated by the March 29, Agreement. Indeed, the lower court's decision to grant summary judgment in favor of Fidelity becomes even more problematic when one examines the Transcript of Proceedings from the original trial. The issue as to the meaning of the March 29, Agreement with respect to its bearing on termination of the Agency Agreement was succinctly addressed both at trial in the form of witness testimony (Appendix at A-64-65) and pre-trial pursuant to a pre-trial motion made by Fidelity to prohibit introduction of oral statements relative to the March 29, Agreement. Appendix at A-43-49. At the pre-trial hearing, Fidelity admitted, stipulated and agreed that part of the March 29, Agreement was to forego remedies that it might have at the moment, provided that National lived up to the March 29, Agreement. Appendix at A-46. Fidelity's own admission quantifies the duration of its forbearance of its right to

[2] In its April 7th Order granting Fidelity's motion for summary judgment, the Court recognized that it held as a matter of law that the March 29, Agreement did not modify the Agency Agreement. Appendix at A-7.

terminate the Agency Agreement by linking it squarely to National's continuing performance of the March 29, Agreement. It is difficult to comprehend how Fidelity's admission as to the meaning of the March 29, Agreement is anything but conclusive evidence of the parties' intent to modify the "immediate" termination provisions of the Agency Agreement.

The course of conduct by Fidelity subsequent to the execution of the March 29, Agreement also provides compelling support for the conclusion that the March 29, Agreement modified the Agency Agreement with respect to Fidelity's right to immediately terminate the Agency Agreement. In fact, the parties operated under the March 29, Agreement for nearly four months after its execution.

Further evidence as to the meaning of the March 29, Agreement was presented at trial in the form of the testimony of National's president, Joel Holstad. Holstad testified that he understood that in executing the March 29, Agreement, Fidelity was not going to cancel the Agency Agreement, which is why he liquidated Nationals assets and gave the proceeds to Fidelity. Appendix at A-63-65. Undeniably, a reasonable inference that could be drawn from the facts of this case is that by executing the March 29, Agreement National would receive something more in return than Fidelity's agreement not to terminate the Agency Agreement the same day it executed the March 29, Agreement. Appendix at A-65. Based on Fed. R. Civ. P. 56 and the Eighth Circuit's own formulation of the summary judgment standard, then, the lower court committed reversible error when it granted Fidelity's motion for summary judgment because disputed material fact issues remain.

The question of whether Fidelity waived its right to immediate termination of the Agency Agreement when it entered into the March 29, Agreement presents another genuine fact issue. As identified above, Fidelity's pre-trial admission as to the meaning of the March 29, Agreement,

Fidelity's course of conduct after executing the March 29, Agreement, and the testimony of National's president are all operative facts which preclude summary judgment with respect to whether Fidelity waived its right to immediately terminate the Agency Agreement when it entered into the March 29, Agreement. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986) (A factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party"). Again, disputed material fact issues should have precluded the trial court from granting Fidelity's motion for summary judgment. This Petition provides the Court with the opportunity to correct the prejudicial errors of the trial court.

II. WHEN A NEW TRIAL HAS BEEN GRANTED AND THERE IS A CONFLICT BETWEEN THE JUDGE AND THE JURY, THE SEVENTH AMENDMENT DICTATES THAT AN APPELLATE COURT CONDUCT A MORE SEARCHING INQUIRY INTO WHETHER THE TRIAL JUDGE ABUSED ITS DISCRETION

The trial court's decision to set aside the jury verdicts it did not agree with and grant a new trial cries out for a "more searching inquiry" by the appellate court into whether the trial judge abused his discretion. See e.g., District of Columbia v. Tri County Industries, Inc., 200 F.36 832 (D.C. Cir. Ct. App. 2000) *writ dismissed as improvidently granted,* 121 S.Ct. 850 (2001) (Court of Appeals reviews the district courts grant of a new trial for abuse of discretion, but a more searching inquiry is required if a new trial is granted than if denied, because of the concern that a judge's nullification of the jury's verdict may encroach on the jury's important fact finding mission). In Dimick v. Schiedt, 293 U.S. 474, 486 (1935), which held that the trial judge's increase of a jury award of damages

violated the Re-examination Clause of the Seventh Amendment, the Court stated that "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." See also Foust v. Munson S.S. Lines, 299 U.S. 77, 84 (1936) (Story, J.) ("The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy."). The Eighth Circuit purports to agree that where the trial court finds the verdict contrary to the weight of the evidence and grants a new trial that the appellate court should "exercise a closer degree of scrutiny and supervision...in order to protect the litigants' right to jury trial." Fireman's Fund Ins. Co. v. Aalco Wrecking Co., Inc., 466 F.2d 179, 187 (8th Cir. Ct. App. 1972). National contends that the appellate court's scope of review in this matter was unduly narrow, and that deference should have been given to the jury rather than to the trial judge.

In this case, the appellate court's "more searching inquiry" into the trial judge's decision to set aside the jury verdicts is remarkable for what it did not encompass. This is a case where the trial judge set aside select jury verdicts it did not agree with and did so under the auspices of irreconcilable inconsistency. Appendix at A-2. Yet, the trial judge never resubmitted the verdict to the jury prior to its discharge. See City of Los Angeles v. Heller, 475 U.S. 796, 106 S.Ct. 1571 (1986) (Justices Stevens and Marshal dissenting) ("upon receiving apparently inconsistent verdicts, a judge has the responsibility to resubmit the question to the jury"). Fidelity never objected to the verdict form prior to its submission to the jury, nor did it request that the verdict be resubmitted to the jury prior to its dismissal. See Skillin v. Kimbal, 643 F.2d 19, 20 (1st Cir. Ct. App. 1981) (under Rule 49(a), a lack of a request to have the jury resume consideration results in a

waiver). As illustrated above, the trial court, contrary to Fed R. Civ. P. 56, rendered summary judgment despite a genuine factual dispute as to the issues of waiver and contract modification. Lastly, the trial judge, after ignoring the evidence presented by National at trial and reversing the stipulated interpretation of the March 29, Agreement, ruled that the verdicts were against the great weight of the evidence.

The question becomes, "What did the appellate court's 'more searching inquiry' encompass?" In one paragraph of analysis, the appellate court states that a jury could have found that National admitted to a breach of the Agency Agreement when it entered into the March 29, Agreement, thus giving Fidelity cause to immediately terminate the Agency Agreement. Appendix at A-56. Therefore, according to the court, "The jury's verdict on the counterclaim was seriously erroneous and a miscarriage of justice; as a result, the district court's grant of the motion for a new trial in this situation was proper." Id. One could easily extend the appellate court's logic to the conclusion that the March 29, Agreement itself was sufficient evidence for the jury to conclude that Fidelity had chosen not to exercise its right to terminate National without notice provided that National lived up to its end of the agreement. Thus, when the jury weighed the evidence at trial and decided that National did not breach the March 29, Agreement, they concluded that Fidelity's "immediate" termination on June 20th constituted a wrongful termination of the modified Agency Agreement. If the court of appeals were giving deference to the jury as called for under the Seventh Amendment, there is no doubt that the jury's verdicts would stand.

National contends that the very narrow abuse of discretion standard that is used when a trial judge refuses to grant a new trial, i.e., her ruling is in agreement with the jury, must be broadened when a trial judge grants a new trial on the grounds that the verdict was against the great weight of the

evidence. Requiring that an appellate court conduct a "more searching inquiry" into a district court grant of a new trial on the grounds that the jury verdict is against the great weight of the evidence is consistent with this Court's approval of the review of new trial rulings for abuse of discretion[3], and would safeguard Seventh Amendment rights. As is readily apparent in the instant matter, the court of appeals' scrutiny of the lower court's decision is at best, inadequate, at worst, a travesty. The Seventh Amendment demands more.

A. THE LOWER COURT'S DECISION TO ORDER A NEW TRIAL FLIES IN THE FACE OF THE SEVENTH AMENDMENT AND CONSTITUTES AN ABUSE OF DISCRETION

Supreme Court precedent makes it clear that a jury verdict must be against the great weight of the evidence before a new trial may be granted. Tennant v. Peoria & P.U.R. Co., 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520 (1944). Otherwise, it would destroy the role of the jury as the principal trier of the facts, and would enable the trial judge to disregard the jury's verdict at will. Id. In dealing with motions for new trials, courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn inferences or conclusion or because judges feel that other results are more reasonable.[4] Fed. R.

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[3] See Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996).

[4] In its Order granting Fidelity's motion for a new trial, the lower court addressed National's argument that the March 29, Agreement modified the Agency Agreement with respect to Fidelity's right to immediately terminate the Agency Agreement. Appendix at A-26-27. The court, acting as the thirteenth juror, declared, "the *Court* is not persuaded that the March 29, Agreement modified the terms concerning termination in the Agency Agreement." (Emphasis added.)(Appendix at A-27.)

Civ. P. 50(c). In this case, there was ample evidence supporting the jury verdict that Fidelity breached the Agency Agreement.

At trial, National presented evidence of Fidelity's breach of the Agency Agreement which occurred within the time frame of March 29th through June 20th. For instance, National presented evidence that the day after the execution of the March 29, Agreement, Fidelity sent out notices to all of National's lenders indicating that they were no longer the underwriter for National. Appendix at A-66-67. National presented evidence of Fidelity's attempt to negotiate a separate underwriting agreement with a major source of National's business. Appendix at A-69-76. National elicited testimony from Jeffrey Street, a Fidelity employee who admitted that Fidelity had a wrongful motive in terminating National. Appendix at A-69-70. In light of the evidence in front of it, it is not difficult to understand how a rational jury could conclude that Fidelity breached both the modified Agency Agreement and the March 29, Agreement. As the evidence indicates, the jury verdicts in this case were neither inconsistent[5] nor against the great weight of the evidence. Rather, the verdicts were consistent with the facts and evidence that were presented to the jury.

As the basis for affirming the lower court's erroneous grant of a new trial, the court of appeals accepted the lower court's reasoning that because National had defaulted under the terms of the Agency Agreement, Fidelity had cause to terminate the Agency Agreement "immediately." Appendix at A-56. As already identified *supra*, however, the fatal flaw in the analysis of the court is that it necessarily ignores the fact that Fidelity did not terminate Fidelity "immediately" until June 20th, and within the time frame of March 29th through

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[5] See e.g., Harris Market Research v. Marshall Marketing and Communications, Inc., 948 F.2d 1518 (10th Cir. Ct. App. 1991) (jury finding that both parties breached a licensing agreement held not to be inconsistent).

June 20th, the only breach that the jury found was Fidelity's breach of the March 29 agreement. Appendix at A-37-38.

B. THE LOWER COURT ABUSED ITS DISCRETION IN TAKING THE ISSUE OF DAMAGES FROM THE JURY AND DECIDING IT AS A MATTER OF LAW

The district court applied an incorrect legal standard in granting Fidelity's motion for a new trial on the issue of damages. In short, the trial judge found that the award was against the weight of the evidence only after adding to Fidelity's side of the scale Fidelity's argument, not considered by the jury, that the recovery of future profits is limited to the notice term of the contract. Appendix at A-3 and A-28-30. It is commonplace that a jury verdict must be reviewed in relation to the record before it. TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 468 (1993). A district court by definition abuses its discretion when it makes an error of law. Koon v. United States, 518 U.S. 81, 100 (1996). Where errors of law are at issue, an appellate court does not have to defer to the district court's resolution, but instead engages in de novo review. Koon, 518 U.S. at 100. By going outside the record in making its determination to grant a new trial on the issue of damages, the trial court abused its discretion and committed reversible error.

In this case, the district court erred in ruling as a matter of law that the verdict was excessive. The district court, ex post, accepted Fidelity's legal argument that lost profits were limited to the 30-day period following the allegedly improper termination, an issue that was never considered by the jury. Appendix at A-3, and A-28-30. The jury, after being fully instructed, decided that National had in fact established damages for Fidelity's breach of the Agency Agreement in an amount of $566,000. Appendix at A-38. By ruling as a matter of law that lost profits were not available to National

for Fidelity's breach of the Agency Agreement, the district court was improperly resolving the strictly factual dispute of the amount of damages that had already been considered by the jury. The district court ruling thus constituted an intrusion by the judge into a strictly factual dispute of the amount of damages that had already been resolved by the jury.

Even if the trial court applied the correct legal standard, the trial court abused its discretion because the evidence presented at trial would allow a rational jury to arrive at the same conclusion. The "rational jury" standard is widely accepted as the appropriate standard for appellate review of grants or denials of new trials based on excessiveness of the verdict. This objective standard of review is substantially similar to this Court's announced standard applicable in criminal cases in Jackson v. Virginia, 443 U.S. 307, 324 (1970) (proper inquiry is whether "no rational trier of fact could have" reached the same verdict). Indeed, as this Court has observed with respect to excessiveness review of jury verdicts:

> Although courts adopting a more deferential approach use different verbal formulations, there may not be much practical difference between review which focuses on 'passion and prejudice,' 'gross excessiveness,' or whether the verdict was 'against the great weight of the evidence.' All of these may be rough equivalents of the standard this Court articulated in Jackson v. Virginia.
>
> Honda Motor Co. v. Oberg, 512 U.S. 415, 432 n.10 (1994).

In this case, the jury returned a general verdict awarding National damages for Fidelity's breach of the Agency Agreement in an amount of $566,000. Appendix at A-36. There were no written interrogatories submitted to the jury as

permitted by Fed. R. Civ. P. 49; therefore, one is unable to tell under what theory the damages were awarded. The special verdict form simply instructed that if the jury found in favor of a party, they must decide how much money, if any, would fairly compensate the party for the other party's breach. Id. At trial, National's president, Holstad, testified that National earned profits in the area of $350,000 to $400,000 in 1992; in excess of $500,000 in 1993; and that it expected to earn approximately $200,000 in 1994.[6] Appendix at A-61-62. Because National presented proof of damages at trial, there was no legal basis for the district court to declare that the damage award was not supported at trial. Moreover, under the objective "rational jury" standard, the award must stand because the award does not fall into the range where "no rational trier of fact" could have reached the same verdict.

The court of appeals chose not address the issue of whether the trial court abused its discretion in granting a new trial on the issue of damages.

[6] Based on his experience and his actual knowledge of the financial condition of the company, National's president was competent to testify as both an expert and someone with actual knowledge. See 32 *CJS* Evidence §§ 520, 531, 537, 661.

CONCLUSION

For the foregoing reasons, the Court should grant this petition and reverse the decision below.

Respectfully submitted,

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Attorney for Petitioners

Dated: November 14, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

FIDELITY NATIONAL TITLE INSURANCE COMPANY OF NEW YORK,

Plaintiff,

v.

NATIONAL TITLE RESOURCES CORPORATION and JOEL M. HOLSTAD,

Defendants.

Civil No. 4-95-577 (JRT/RLE)

MEMORANDUM OPINION AND ORDER

James A. Beitz AND Michael C. Hagerty, HAGERTY, JOHNSON, ALBRIGHTSON & BEITZ, 701 Fourth Avenue South, Suite 9010, Minneapolis, MN 55415, for plaintiff.

Frederic W. Knaak, HOLSTAD & KNAAK, 3535 Vadnais Center Drive, Suite 130, St. Paul, MN 55110; Gary B. Bodelson, LAW OFFICE, 247 Third Avenue South, Minneapolis, MN 55415, for defendants.

Plaintiff Fidelity National Title Insurance Co. ("Fidelity") entered into an Issuing Agency Agreement (the "Agreement") dated July 1, 1994, with defendant National Title Resources Corp. ("National") for the purpose of issuing title insurance. Under the agreement, National, a title insurance agent, issued title insurance policies underwritten

by Fidelity, performed closing operations, and managed funds it collected for Fidelity. In late 1994, Fidelity discovered escrow shortages as well as other irregularities that would constitute cause to terminate the Agreement. The parties thereafter entered into an agreement on March 29, 1995, requiring National to provide Fidelity with security for the shortages and take other action to assure Fidelity of its performance. On June 20, 1995, Fidelity terminated the Agreement and later commenced this action against National and its president, defendant Joel M. Holstad. Fidelity asserted claims of breach of contract, negligence, conversion, and breach of a personal guarantee. National counterclaimed, alleging various torts and breaches of contract by Fidelity.

This matter was tried to a jury from June 8, 1998 to June 25, 1998. The jury returned a verdict on June 30, 1998. The jury found that National breached the Agreement and was negligent in its handling of three real estate transactions.[1] The jury also found that Fidelity breached the Agreement, and awarded National $566,000 in damages as a result of Fidelity's breach.

In a Memorandum Opinion and Order dated September 24, 1998, the Court granted in part Fidelity's motion for a new trial based on its conclusion that the jury's verdict was inconsistent and could not be reconciled. The jury found that National breached the Agreement and negligently handled four real estate transactions. These actions provided cause for Fidelity's termination of the Agreement under the express terms of the Agreement. Consequently, according to the jury's findings, Fidelity's termination of the Agreement could not have breached the Agreement, yet the jury found that Fidelity breached the Agreement. The Court rejected National's argument that the jury could have concluded that

[1] The Court took judicial notice of National's negligence in a fourth transaction, and the jury found in favor of National on three other transactions.

the conduct of Paul Hunsinger, a Fidelity auditor, constituted a breach of the Agreement in 1994, before National's breach. The Court noted that National failed to make this argument to the jury, and that throughout the case National asserted that Fidelity breached the Agreement by terminating it improperly. The Court also noted that such a finding would not comport with National's award of damages, because National failed to present evidence of damages flowing from the alleged breach by Hunsinger.

The Court also agreed with Fidelity that the amount of lost profits the jury awarded to National lacked sufficient evidentiary support, because the award exceeded National's 1992 and 1993 revenues and there was evidence of a business downturn in 1994. Fidelity also argued that, because the Agreement permitted Fidelity to terminate National without cause upon thirty days' written notice, the damages from a wrongful termination must be limited to any damage National suffered in the thirty-day period following the termination that flowed from Fidelity's alleged failure to comply with the termination provisions. The Court accepted this reasoning, and thus limited the new trial to the following issues:

1. Whether Fidelity breached the termination provisions in the Agency Agreement when it terminated National; and
2. If Fidelity breached the termination provisions, what damages, if any, did National sustain during the thirty days following the termination.

There are a number of motions pending before the Court. Fidelity moves for summary judgment or, in the alternative, partial summary judgment. In connection with its motion for summary judgment, Fidelity also moves in limine to exclude the testimony of National's damages expert. National brings a cross-motion for summary judgment, and also moves for an order reinstating the jury's verdict and for summary judgment

on National's claim for attorney's fees. Finally, National brings a motion in limine to exclude the testimony of two of Fidelity's experts. For the reasons set forth below, the Court grants Fidelity's motions for summary judgment and partial summary judgment, dismisses the counterclaim, and denies the remaining motions.

BACKGROUND

Section 11 of the Agreement pursuant to which National acted as Fidelity's agent allowed for termination in three circumstances. First, either party could terminate, without cause, upon thirty days' written notice to the other party. Second, upon the occurrence of an event of default, Fidelity could terminate upon ten days' written notice to National. Finally, the Agreement permitted Fidelity to terminate immediately, in its sole discretion, upon the occurrence of an event of default or in the event financial irregularities were disclosed as a result of an audit or examination conducted pursuant to the Agreement. In section 13, the Agreement defined an "event of default" to include the following:

> Agent fails to promptly make any payment when due under this Agreement or to observe and/or perform any of Agent's covenants, conditions, agreements or obligations under this Agreement. . . .
>
> Deficiencies in Agent's Trust Account(s). Failure to properly and promptly reconcile such trust or escrow account or allow review of said trust or escrow account by [Fidelity] employees conducting audits at Agent's operation(s).

Schedule D of the Agreement sets forth National's duties with respect to maintaining escrow accounts:

> Agent agrees to maintain an account designated as an "escrow account" separate and apart from Agent's other operating accounts, to safeguard all funds due [Fidelity] and/or such funds as [Fidelity] has any liability. To the extent that Agent conducts real estate closings which require the Agent to handle and disburse funds incident to such closings,.... Agent shall maintain all such funds in the escrow account required by this section.....

After Fidelity discovered shortages in National's escrow accounts, the parties entered into an agreement dated March 29, 1995 (the "March Agreement"). The March Agreement recited that National defaulted by, among other actions, taking fiduciary funds held in escrow accounts. It required National to disclose its bank account records, turn over escrow-related banking responsibilities to a manager approved by Fidelity, cooperate with any necessary accounting or auditing procedures, continue reasonable efforts to fund the shortages, and cooperate in providing security for the shortages. The March Agreement did not, however, explicitly impose any duties on Fidelity, nor did it specify a particular length of time that Fidelity would refrain from terminating the Agreement.

During the trial, Holstad admitted that there were shortages in the escrow accounts and that National deposited recording fees and premiums owed to Fidelity into its operating accounts. As noted previously, the jury found that National negligently handled four real estate closings. Finally, National also admits that, at the time of termination, it owed premiums to Fidelity. National does not dispute that all of these actions constitute events of default under the Agreement.

ANALYSIS

A. Standard of Review

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). Only disputes over facts that might affect the outcome of the suit under the governing substantive law will properly preclude the entry of summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In considering a motion for summary judgment, a court is required to view the facts in a light most favorable to the nonmoving party. *See Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 585 (8th Cir. 1987). Summary judgment is to be granted only where the evidence is such that no reasonable jury could return a verdict for the nonmoving party. *See Anderson*, 477 U.S. at 248. The moving party bears the burden of bringing forward sufficient evidence to establish that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

B. Fidelity's Motion for Summary Judgment

Fidelity moves for summary judgment on two grounds. First, Fidelity argues that the undisputed facts demonstrate that Fidelity had cause to terminate the Agreement and therefore its termination was not a breach. Second, Fidelity brings a motion in limine to exclude the testimony of National's damages expert, Donald Gorowsky.

1. Termination for Cause

Fidelity first argues that it is undisputed that National caused shortages in the escrow trust accounts, commingled

closing proceeds and escrow funds in its operating account, treated those funds as income to itself, and failed to pay premiums to Fidelity, all in violation of the Agreement. The trial transcripts and relevant documents demonstrate that Fidelity is correct. National disclosed during discovery for the new trial that the witnesses and testimony it intends to offer will not vary from that offered at the first trial. During the first trial, Holstad admitted that there were escrow shortages and that National deposited recording fees and premiums owed to Fidelity into its operating account. National also now admits that it owed premiums to Fidelity at the time of termination. Finally, National does not dispute that the issue of its negligence has been fully litigated and resolved against it, and indeed argues, in its motion in limine, that relitigation of this issue is barred by the doctrine of res judicata.

National now argues that no deficiencies in its trust accounts were ever proven, but does not directly address Holstad's admissions, the commingling of funds, or its negligence. Instead, National argues that by virtue of the March Agreement, Fidelity waived the right to terminate based on any of National's prior breaches. In response, Fidelity argues that the Court has already decided against National on this issue. It is true that the Court held that the March Agreement did not modify the terms of the Agreement. This is not equivalent, however, to holding that Fidelity did not waive the terms of the Agreement as to breaches occurring before the March Agreement. While the Agreement provided that it could not be modified except in writing, "a waiver of a forfeiture for nonperformance, according to the terms of the written contract, may be proven by parol," even for contracts within the statute of frauds. *Rooney v. Dayton-Hudson Corp.*, 246 N.W.2d 170, 176 (Minn. 1976) (quoting *Scheerschmidt v. Smith*, 77 N.W. 34, 35 (Minn. 1898)). Thus, the issue of whether Fidelity waived its right to terminate is separate from the issue of whether the

March Agreement modified the termination provisions in the original Agreement.

Waiver is the intentional relinquishment of a known right and is the "expression of an intention not to insist upon what the law affords." *Carlson v. Doran,* 90 N.W.2d 323, 328 (Minn. 1958). The intent to waive may be inferred from conduct. *See id.* Conduct evincing an intent to waive involves dealing with the other party in a manner "consistent only with a purpose...to regard the contract as still subsisting and not terminated by the default." *Malmquist v. Peterson,* 183 N.W. 138, 140 (Minn. 1921).

The only evidence of a waiver National cites is the March Agreement itself. The text of this agreement takes note of National's default, recites Fidelity's right to terminate, and places significant new obligations on National. While the March Agreement does not explicitly state the consideration given by Fidelity, the Court has already held that the recitation of Fidelity's right to terminate reflects that Fidelity agreed simply to forego its right to an immediate termination. Nowhere does the March Agreement state that Fidelity's right to terminate without notice is otherwise compromised, nor does the March Agreement reflect an intent to waive altogether Fidelity's right to terminate based on National's known breaches. Rather than being consistent "only with a purpose on [Fidelity's] part to regard the contract as still subsisting," the March Agreement is much more consistent with a purpose to salvage the Agreement while at the same time preserving Fidelity's rights. The Court therefore holds that the March Agreement does not constitute a waiver of Fidelity's right to terminate the contract without notice based upon National's prior breaches.

While in another portion of its brief National cites Holstad's testimony that he understood that the March Agreement meant that Fidelity was not going to cancel the contract, it identifies no other actions by Fidelity that it contends indicate a waiver of Fidelity's rights. Accordingly,

the Court finds as a matter of law that Fidelity did not waive its right to terminate the Agreement based on National's pre-March 29, 1995 breaches.

2. Fidelity's Alleged Breaches

National argues that Fidelity breached the Agreement before National. These alleged breaches involved such events as the closing of National's Norwest account, alleged intentional creations of account shortages, an alleged attempt to take over one of National's offices, and Fidelity's alleged actions in causing assigned properties to be sold at a loss. As Fidelity notes, these allegations range far afield from the Court's Order for a new trial. Nonetheless, it is possible to construe these arguments as an attempt to invoke the principal that "where one of the contracting parties makes it impossible for the other to perform, he should not be permitted to take advantage of his own action in so doing." *Haase v, Stokely-Van Camp, Inc.*, 99 N.W.2d 898, 902 (Minn. 1959). Under this doctrine, National could argue that Fidelity caused National's breaches and therefore should not be permitted to use these breaches as a basis for terminating the Agreement.

National argues at length regarding Fidelity's alleged actions in causing account shortages. At best, therefore, there could be a fact issue regarding whether Fidelity caused National to breach the Agreement in this respect.[2] None of the alleged breaches by Fidelity, however, are connected to National's negligence, its commingling of fiduciary funds with its own funds, or its failure to pay premiums, and National does not so argue. Even if National could show that Fidelity caused the escrow shortages, therefore, Fidelity had ample other grounds for terminating the contract.

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[2] Even if there were a factual issue in this regard, which the Court does not determine, National would still have to overcome the jury's finding that Ed Oesch, whom National claims created the shortage, did not act solely as an agent for Fidelity.

Under the express terms of the contract, Fidelity had the right to terminate without notice based on National's undisputed breaches. At oral argument, counsel for National admitted that Fidelity's alleged waiver and Fidelity's alleged prior breaches are the only bases for its argument that Fidelity did not have the right to terminate National without prior notice. National has not shown either that Fidelity waived its right to terminate or that Fidelity caused all of National's breaches by making it impossible for National to perform. The Court therefore grants Fidelity's motion for summary judgment on National's claim for breach of the Agreement's notice provision and denies National's motion for summary judgment.[3] As a result, the Court need not reach either party's motion in limine, and they are therefore denied as moot.

C. Fidelity's Motion for Partial Summary Judgment

Fidelity also moves for partial summary judgment on various torts and breaches National claims Fidelity committed in addition to the failure to give notice. The Court need not belabor this issue; the Order granting a new trial quite clearly limits the issues before the Court to whether Fidelity breached the termination provisions in the Agreement when it terminated National, and what damages, if any, National suffered during the thirty days following termination as a result of that breach. Having determined that Fidelity did not breach the termination provision, the Court has now disposed of the issues before it, and Fidelity's motion would appear to

[3] National also filed a motion for an order reinstating the jury verdict and a motion for summary judgment on National's claim for attorney's fees. The Court previously denied a motion by National for attorney's fees and awarded attorney's fees to Fidelity under the Agreement. Neither party has briefed or discussed these new motions, and the Court is not aware of any authority to support an award of fees to National. For these reasons, and in view of the Court's grant of summary judgment to Fidelity, they are therefore denied.

be moot. Nonetheless, the Court grants this motion in order to make clear that National has no remaining claims pending before the Court.

ORDER

Based on the submissions of the parties, the arguments of counsel and the entire file and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Plaintiffs motions for summary judgment on the breach of contract claim and for partial summary judgment on claims beyond the scope of the Court's Order for a new trial [Docket No. 190] are **GRANTED**;

2. Defendant National Title Resources Corporation's motions for summary judgment that plaintiff's breach of the Agency Agreement predated any allegation of breach of contract, for an order reinstating the jury verdict, and for summary judgment on defendant's claim for attorney's fees [Docket No. 198] are **DENIED**;

3. Plaintiff's motion in limine [Docket No. 193] is **DENIED as moot**;

4. Defendant National Title Resources Corporation's motion in limine [Docket No, 201] is **DENIED as moot**;

5. Defendant National Title Resources Corporation's counterclaim [Docket No. 20] is **DISMISSED with prejudice**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: April 7, 2000.

s/
JOHN R. TUNHEIM
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

FIDELITY NATIONAL TITLE INSURANCE COMPANY OF NEW YORK,

Plaintiff,

v.

NATIONAL TITLE RESOURCES CORPORATION and JOEL M. HOLSTAD,

Defendants.

Civil No. 4-95-577

MEMORANDUM OPINION AND ORDER

James A. Beitz, HAGERTY, JOHNSON, ALBRIGHTSON & BEITZ, 701 Fourth Avenue South, Suite 1700, Minneapolis, MN 55415, for plaintiff.

Frederic W. Knaak, HOLSTAD & LARSON, 3535 Vadnais Center Drive, Suite 130, St. Paul, MN 55110, for defendants.

Plaintiff Fidelity National Title Insurance Company of New York ("Fidelity") entered into an agency agreement with defendant National Title Resources Corporation ("National"), a title insurance agent. Under the agreement, National issued title insurance policies underwritten by Fidelity, performed closing operations, and managed funds it collected for Fidelity. Fidelity commenced this action against National and

its President, defendant Joel M. Holstad. Fidelity asserted claims for breach of contract, negligence, conversion and breach of a personal guarantee. National counterclaimed for negligence and wrongful termination.

This matter is before the Court on Fidelity's post-trial motion for judgment as a matter of law or, alternatively, for a new trial. Also pending are motions by Fidelity and National for attorneys' fees. For the reasons that follow, Fidelity's motion for a new trial is granted as to National's counterclaim for breach of the Agency Agreement. National's motion for an award of attorneys' fees, costs and interest is denied, and Fidelity's motion for attorneys' fees is granted.

BACKGROUND

Fidelity and National entered into an Issuing Agency Agreement ("Agency Agreement") dated July 1, 1994. As part of the Agency Agreement, Fidelity appointed National to issue title insurance policies underwritten by Fidelity. The Agency Agreement required that National receive and process applications for title insurance "in accordance with the provisions of state law and/or regulations, in conformity with usual and customary practices and procedures, [and] prudent underwriting principles." The Agency Agreement also required National to maintain fiduciary funds in escrow accounts. The agreement provides:

> Agent agrees to maintain an account designed as an "escrow account" separate and apart from Agent's other operating accounts, to safeguard all funds due [Fidelity] and/or for such funds as [Fidelity] has any liability. To the extent that Agent conducts real estate closings which require the agent to handle and disburse funds incident to such closings,...Agent shall maintain all such funds in the escrow account required by this section.

* * *

Agent shall keep safely and segregated in a bank account all monies ... that may be entrusted to Agent by [Fidelity] or others in the course of the issuance of [Fidelity's] Title Assurances hereunder, and keep safely any property so entrusted to Agent.

The Agency Agreement defines certain actions as "Events of Default." The Events of Default include:

1. Agent fails to promptly make any payment when due under this Agreement or to observe and/or perform any of Agent's covenants, conditions, agreements, or obligations under this Agreement.

* * *

5. Deficiencies in Agent's Trust Account(s).

Finally, the Agency Agreement establishes terms for termination as follows:

A. This Agreement may be terminated by either Party without cause upon thirty (30) days' written notice to the other Party.

* * *

B. ...[T]his Agreement may be terminated, in the sole discretion of [Fidelity], immediately in the event of an occurrence of an Event of Default as set forth... herein or in the event financial irregularities are disclosed as a result of an audit or examination....

In early 1995, Fidelity discovered shortages in National's escrow accounts. On March 29, 1995, the parties entered into an agreement concerning the shortages (hereafter "March 29, 1995 Agreement" or "March Agreement"). The recitals of the March 29, 1995 Agreement state:

> WHEREAS, National has defaulted under the Agency Agreement by, among other things, taking fiduciary funds held in escrow accounts; and
>
> WHEREAS, the Agency Agreement provides that under such circumstances of default Fidelity may, among other things, terminate the Agency Agreement and take immediate possession of all of its property in National's possession..., and
>
> WHEREAS, National and its President, Joel Holstad, have given Fidelity various securities to secure a note payable to Fidelity intended to reimburse the...escrow shortage....

The terms of the March 29, 1995 Agreement require that National disclose its bank account records, turn over escrow-related banking responsibilities to Fidelity, cooperate with any necessary accounting or auditing procedures, continue reasonable efforts to fund the shortages, and cooperate in providing Fidelity with security for the shortages. Fidelity and National executed the March Agreement under oath, and Holstad guaranteed National's performance. The March 29, 1995 Agreement does not specify a particular length of time that Fidelity will refrain from terminating the Agency Agreement based on the account shortages.

In addition to claims based on account shortages, Fidelity asserted negligence claims arising out of real estate closings that took place from March 1994 through May 1995. At trial, the parties referred to the transactions as the DeWitt, Arndt,

Lake Elmo, Construction Mortgage Investors Corporation, Blood, Pogue and Builders Development transactions.

The Court took judicial notice of National's negligence in the DeWitt transaction. In March 1994, National issued a commitment for a Fidelity title insurance policy to DeWitt Brothers Homes, Inc. National also served as closing agent in the DeWitt transaction. After the closing, National failed to record DeWitt's warranty deed and to pay the property taxes. When judgment liens were placed on the property, DeWitt Brothers Homes commenced litigation against National in state court. The district court granted summary judgment for DeWitt on its negligence claim, holding that National breached a duty to DeWitt as a matter of law when it failed to properly record the closing documents. The Minnesota Court of Appeals affirmed. *See DeWitt Bros. Homes, Inc. v. National Title Resources Corp.*, 1996 WL278230 (Minn. Ct. App. 1996). This Court took judicial notice of the finding in *DeWitt* and instructed the jury that National was negligent in the DeWitt transaction.

On June 20, 1995, Fidelity terminated the Agency Agreement with National. The termination letter states:

> Since our last formal communication..., I have learned that National...has unilaterally rescinded its March 29, 1995 agreement to turn over all escrow-related banking responsibilities related to Fidelity... insured transactions... For these, as well as National's continued escrow shortage and other various violations of National's Issuing Agency Agreement, Fidelity hereby notifies you that it is cancelling [sic] National's Issuing Agency Agreement immediately for cause.

Although National also had a relationship with another underwriter, Stewart Title, National went out of business a few months after the termination.

In its counterclaims, National sought lost profit damages as a result of the termination. National claimed that Fidelity breached the Agency Agreement when it terminated National because Fidelity did not have cause and did not give 30 days' advance notice. National also claimed that Fidelity breached the March 29, 1995 Agreement.

The Court conducted a jury trial on the parties' claims from June 8, 1998 to June 25, 1998. The special verdict form asked the jury to answer several questions related to the claims and counterclaims. The verdict form required the jury to determine: 1) whether National breached the Agency Agreement; 2) whether National or Joel Holstad breached the March 29, 1995 Agreement; 3) whether Fidelity breached the Agency Agreement; 4) whether Fidelity breached the March 29, 1995 Agreement; 5) whether National was negligent in the seven above-listed real estate transactions;[1] 6) whether Edward Oesch acted solely as Fidelity's agent and whether he was negligent; and 7) whether defendants converted property belonging to Fidelity. Upon finding liability, the special verdict form required the jury to assess damages.

The jury rendered a verdict on June 30, 1998. The jury found that National breached the Agency Agreement and awarded Fidelity $244,781.11 in damages. In addition to the DeWitt transaction, the jury found that National was negligent in the Arndt, Lake Elmo, and Construction Mortgage Investors Corporation transactions. The jury awarded Fidelity $208,867.77 in damages as a result of the negligence. The jury did not find liability on Fidelity's claims for conversion and breach of the March 29, 1995 Agreement.

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[1] As noted above, the Court took judicial notice of National's negligence in the DeWitt transaction. The verdict form asked the jury to determine whether National was negligent in the other transactions. The form then required the jury to assess damages for all transactions where National was negligent.

The jury rejected National's negligence claim arising from the conduct of Edward Oesch. However, it found that Fidelity breached both the Agency Agreement and the March 29, 1995 Agreement. The jury awarded National $566,000 in damages as a result of the breach of the Agency Agreement. The jury did not award any damages arising from the breach of the March 29, 1995 Agreement.

Fidelity moves for judgment as a matter of law or, alternatively, for a new trial. Fidelity challenges the jury's finding of liability on National's claim for breach of the Agency Agreement, the jury's damage award, the jury's finding that Fidelity breached the March 29, 1995 Agreement, and the jury's finding on its conversion claim.

National makes several arguments in response. First, National contends that Fidelity waived its right to challenge the verdict based on the sufficiency of the evidence by failing to renew its motion for judgment as a matter of law at the close of the evidence. Second, National argues that Fidelity's pre-verdict motion for judgment as a matter of law was limited to the issue of damages. Thus, even if Fidelity preserved all the issues in its Rule 50(a) motion, National contends the only issue Fidelity preserved is the sufficiency of the evidence supporting the $566,000 damage award. Lastly, National argues that the jury's findings are supported by the evidence.

The Court will consider Fidelity's motions for judgment as a matter of law and for a new trial separately.

ANALYSIS

I. Fidelity's Post-Trial Motion for Judgment as a Matter of Law

Fidelity raises four arguments in support of its motion for judgment as a matter of law on National's claim for breach of the Agency Agreement. First, Fidelity claims that the jury's

verdict is inconsistent. Because the jury found that National breached the Agency Agreement and negligently handled four real estate transactions, Fidelity argues that it had cause to terminate the Agency Agreement as a matter of law. Second, Fidelity argues that the damage award is speculative. Finally, Fidelity contends that the Court should have prohibited National from offering any evidence of damages because National did not provide damage calculations in advance of trial, as required under Fed. R. Civ. P. 26.[2]

A. Standard of Review

Fidelity's motion for judgment as a matter of law is governed by Rule 50 of the Federal Rules of Civil Procedure. When faced with a motion for judgment as a matter of law, the Court assesses whether there is sufficient evidence to support the verdict. *Cowan v. Strafford R-VI School Dist.*, 140 F.3d 1153, 1157 (8th Cir. 1998). The Court must view the evidence in the light most favorable to the verdict, giving the prevailing party the benefit of all reasonable inferences. *Howard v. Burns Bros., Inc.*, 149 F.3d 835, __, 1998 WL 388673 at *4 (8th Cir. 1998). Judgment as a matter of law "is only appropriate when all of the evidence points one way and is 'susceptible of no reasonable inference sustaining the position of the nonmoving party.'" *Cowan*, 140 F.3d at 1157 (citing *Keenan v. Computed Associates Int'l, Inc.*, 13 F.3d 1266, 1268 (8th Cir. 1994)). A mere scintilla of evidence is not sufficient to sustain a verdict; rather, the evidence supporting the verdict must be "substantial." *City of Omaha Employees Betterment Ass'n v. City of Omaha*, 883 F.2d 650, 651 (8th Cir. 1989).

[2] The Court carefully considered Fidelity's last two arguments when raised during trial. The Court does not believe Fidelity is entitled to judgment as a matter of law based on either argument.

B. Waiver

Before determining whether Fidelity's motion meets this standard, the Court must determine whether Fidelity preserved the right to challenge the sufficiency of the evidence through a renewed motion for judgment as a matter of law. Fidelity moved for judgment as a matter of law on National's counterclaims on June 25, 1998, shortly before the close of the evidence. The motion addressed all of National's counterclaims. The motion sought judgment as a matter of law on National's counterclaim for breach of the Agency Agreement based on insufficient evidence of damages and causation. Fidelity did not seek judgment as a matter of law on the grounds that no reasonable jury could conclude that Fidelity breached the Agency Agreement. The Court denied the motion as to National's breach of contract claims at the close of the hearing on June 25, 1998.

After the Court ruled on the motion, Fidelity called three rebuttal witnesses. National did not elicit any further testimony. When both parties rested, Fidelity did not renew its motion for judgment as a matter of law. Consequently, Fidelity did not move for judgment as a matter of law "at the close of all the evidence" under Fed. R. Civ. P. 50(b).

Generally, a litigant who fails to move for judgment as a matter of law at the close of the evidence cannot later argue that the verdict is not supported by sufficient evidence. *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 655 (8th Cir. 1995). There are three exceptions to this rule. Under the first exception, a litigant may nevertheless challenge the sufficiency of the evidence when: 1) the litigant made a Rule 50 motion that closely preceded the close of the evidence; and 2) the court somehow indicated that the litigant need not renew the motion to preserve its right to challenge the verdict. *Id.* The second exception allows a litigant to present a challenge to the sufficiency of the evidence despite failing to move for judgment as a matter of law at the close of the evidence where

"not to do so would constitute plain error that would result in a manifest miscarriage of justice." *Id.* The Eighth Circuit recognized a third exception in *BE & K Construction Co. v. United Brotherhood of Carpenters & Joiners of America, AFL-CIO*, 90 F.3d 1318 (8th Cir. 1996). The exception applies when: 1) the district court defers ruling on a Rule 50 motion made prior to the close of the evidence; 2) no evidence related to the claim comes in after the motion; and 3) very little time passes between the motion and the close of the evidence. *Id.* at 1325.

Fidelity did not preserve its right to challenge the sufficiency of the evidence supporting the jury verdict. First, Fidelity's pre-verdict motion concerning National's claim for breach of the Agency Agreement challenged National's proof of damages and causation. Fidelity did not assert that National failed to present evidence that would allow the jury to conclude that it breached the Agency Agreement. A renewed motion for judgment as a matter of law may not advance grounds that were not raised in the pre-verdict motion. *Rockport Pharmacy, Inc. v. Digital Simplistics, Inc.*, 53 F.3d 195, 197 (8th Cir. 1995). Because Fidelity did not challenge the sufficiency of the evidence supporting National's claim that Fidelity breached the Agency Agreement in its motion, the Court may not consider that argument post-trial.[3]

In its pre-verdict motion, Fidelity did challenge the sufficiency of the evidence supporting National's claim that Fidelity breached the March 29, 1995 Agreement. In its memorandum supporting the motion, Fidelity argued:

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[3] Likewise, Fidelity's motion for judgment as a matter of law did not address its conversion claims. Thus, for the same reason, the Court may not consider Fidelity's argument that it is entitled to judgment as a matter of law on those claims. Nevertheless, the Court does not agree that a reasonable fact-finder could only conclude that National and/or Holstad converted Fidelity's funds.

> In Count VI of its counterclaim, National alleges that Fidelity breached the March 29, 1995 agreement.... However, National offered no evidence that the March Agreement obligated Fidelity to do anything other than refrain from canceling the Issuing Agency Agreement...on the date of the March Agreement. National admitted, through the testimony of Joel Holstad, that Fidelity did not cancel the Agency Agreement on the date of the March Agreement, and it has not offered any evidence that Fidelity in any way breached the March Agreement.

However, because Fidelity did not renew the motion at the close of the evidence, Fidelity can only challenge the sufficiency of the evidence post-verdict if one of the above exceptions applies.

Fidelity argues that the first exception applies. Fidelity relies upon a statement the Court made during the charging conference to contend that the Court indicated that a challenge to the sufficiency of the evidence did not need to be renewed to preserve the right to challenge the verdict. During the charging conference, Fidelity objected to a lost profits instruction based on National's lack of evidence of damages. Addressing that issue, the Court stated:

> So at least at this time, I'm inclined to allow that to go forward. I think if there are problems, that can always be cured after the fact relative to whatever the jury may or may not come up with on that score.

Fidelity contends that this statement suggests that it did not need to renew a motion for judgment as a matter of law at the close of the evidence. The Court disagrees. First, the charging conference took place on June 24, 1998 - before the parties submitted their motions for judgment as a matter of law. Second, Fidelity's pre-verdict motion for judgment as a

matter of law challenged the sufficiency of National's evidence of damages, despite the statement. Finally, the statement does not suggest that no further action is needed to preserve the issue. Consequently, the exception does not apply.[4]

For these reasons, Fidelity's post-trial motion for judgment as a matter of law is denied.

II. Fidelity's Motion for a New Trial

In the alternative, Fidelity moves for a new trial. Fidelity's motion is governed by Fed. R. Civ. P. 59(a). The standard for assessing a motion for a new trial is whether the verdict is against the weight of the evidence. *Leichihman v. Pickwick, Int'l,* 814 F.2d 1263, 1266 (8th Cir. 1987). The Court should not grant a motion for a new trial based on the sufficiency of the evidence where reasonable persons could differ in evaluating credible evidence. *Keeper v. King,* 130 F.3d 1309, 1315 (8th Cir. 1997). Instead, the Court must feel that the jury reached a seriously erroneous result in spite of the clear weight of the evidence. *Leichihman,* 814 F.2d at 1267. The district court is not required to give the nonmoving party the benefit of every favorable inference; rather, the court may weigh the evidence and reach its own conclusions. *See id. at* 1266. The key question is whether a "miscarriage of justice" would result if the motion were not granted. *Keeper,* 130 F.3d at 1314.

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[4] Fidelity also contends that the plain error exception applies. First, Fidelity contends that it was plain error to allow the jury to speculate as to National's damages. The Court is not persuaded that it was plain error to allow the jury to determine the amount of National's damages, if any. Second, Fidelity contends that it would be plain error to allow National to recover damages in excess of those it alleges it sustained in the 30 days following the termination. The Court will address the this issue in connection with Fidelity's motion for a new trial.

Fidelity's motion concerns four findings: 1) the jury's finding that Fidelity breached the Agency Agreement; 2) the award of $566,000 in damages for breach of the Agency Agreement; 3) the jury's finding that Fidelity breached the March 29, 1995 Agreement; and 4) the jury's finding on its conversion claim. The Court will address each finding in turn.

A. Breach of the Agency Agreement

Fidelity contends that it is entitled to a new trial on the jury's finding that it breached the Agency Agreement. Fidelity argues that the finding is inconsistent with other conclusions in the verdict, and that the finding goes against the weight of the evidence. The Court agrees with both contentions and orders a new trial on this issue.

1. Inconsistency of the Verdict

The jury found that Fidelity breached the Agency Agreement when it terminated National. Fidelity argues that this finding conflicts with the jury's other conclusions – namely, that National breached the Agency Agreement, and that National was negligent in four real estate transactions. Fidelity argues that these findings constitute "cause" to terminate the Agency Agreement as a matter of law.

The Agency Agreement required that National receive and process applications for title insurance "in accordance with the provisions of state law and/or regulations, in conformity with usual and customary practices and procedures, [and] prudent underwriting principles." The Court took judicial notice of National's negligence in the DeWitt transaction, and the jury found negligence in three other transactions. National's negligence in these transactions amounts to a failure to conform to state law and prudent underwriting principles.

The Agency Agreement allows for immediate termination upon an "Event of Default." The term "Event of Default" includes the failure to "observe and/or perform any of Agent's covenants, conditions, agreements, or obligations under this Agreement." Consequently, National's negligence amounted to an "Event of Default" that gave Fidelity the right to terminate the Agency Agreement immediately without notice. For these reasons, the finding that National was negligent in four real estate transactions is inconsistent with the finding that Fidelity breached the Agency Agreement when it terminated National.

The Agency Agreement also required that National maintain escrow accounts separate and apart from its other operating accounts, and to safeguard all funds due Fidelity. It was undisputed at trial that National had shortages in its accounts, and that it commingled closing proceeds and premiums with its own funds. Based on this evidence, the jury justifiably concluded that National breached the Agency Agreement. However, the same conduct also amounted to an "Event of Default," giving Fidelity the right to terminate the Agency Agreement without notice. Thus, the jury's finding that National breached the Agency Agreement is also inconsistent with the jury's conclusion that Fidelity breached the Agency Agreement when it terminated National.

If an inconsistency in the jury verdict cannot be reconciled, the proper remedy is a new trial. *See, e.g., Atlas Food Sys. & Services, Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 598 (4th Cir. 1996); *Inter Medical Supplies, Ltd. v. EBI Medical Sys., Inc.*, 975 F. Supp. 681, 689 (D.N.J. 1997). There is no way to reconcile the verdict in this case. The jury's findings that National breached the Agency Agreement and that it negligently handled four real estate transactions reflect cause for termination under the express terms of the Agency Agreement. Consequently, Fidelity is entitled to a new trial on National's counterclaim for breach of the Agency Agreement.

National's arguments on this issue are not persuasive. First, National argues that the jury might have concluded that Paul Hunsinger breached the Agency Agreement in 1994, before National breached the Agreement. National did not make this argument to the jury. The theory National asserted in its pleadings, to the jury and throughout this case was that Fidelity breached the Agency Agreement by terminating it improperly. It is illogical to assert that the jury seized upon Hunsinger's conduct as a breach of contract when National never made that argument. Moreover, National did not present any evidence of damages flowing from the alleged breach by Hunsinger. Thus, if Hunsigner's conduct is the purported breach, then National is not entitled to the $566,000 damage award.

National also argues that the March 29, 1995 Agreement modified the Agency Agreement and imposed new obligations on the parties, including an obligation on the part of Fidelity to refrain from terminating the Agency Agreement "for a relatively significant period in the future." In the March 29, 1995 Agreement, defendants agreed to attempt to fund the account shortages, and to take other actions intended to offer security to Fidelity. Although the March Agreement does not specifically state the consideration given by Fidelity, the recitals reflect that Fidelity had the right to terminate the agreement without notice based upon the account shortages. Thus, the March 29, 1995 Agreement required Fidelity to forgo its right to an immediate termination based upon its discovery of account shortages, This consideration is adequate under Minnesota law. *See Ketterer v. Independent School Dist. No. 1 of Chippewa County,* 79 N.W.2d 428, 436 (Minn. 1956) (defining consideration to include any potential advantage or legal detriment).

The Agency Agreement states that it "cannot be amended, modified, or otherwise changed" in any manner except in writing executed by the parties. The March 29, 1995 Agreement is silent concerning any change or

modification to the terms concerning termination, and National did not present any evidence that the parties intended to modify the Agency Agreement. In other words, nothing in the March 29th Agreement or in the evidence presented at trial suggested that Fidelity agreed not to terminate the Agency Agreement "for a relatively significant period of time" based on new and continuing evidence of account shortages. Thus, the Court is not persuaded that the March 29, 1995 Agreement modified the terms concerning termination in the Agency Agreement.

For these reasons, the Court holds that Fidelity is entitled to a new trial on the issue of its liability under the Agency Agreement based on an irreconcilable inconsistency in the jury verdict.

Fidelity is also entitled to a new trial because the verdict is against the great weight of the evidence. Fidelity presented uncontroverted evidence of numerous defaults under the Agency Agreement. Defendants admitted that National's accounts contained shortages, and that National commingled premiums and closing proceeds with its own funds. Fidelity remained liable to its policy holders for the funds and suffered a direct financial loss because of National's actions. In response, National only presented speculative testimony as to Fidelity's motive for the termination.

The clear weight of the evidence demonstrated cause to terminate National. The Court believes the jury reached a seriously erroneous result when it found that Fidelity breached the Agency Agreement in spite of substantial evidence of cause for termination, and that it would be a manifest injustice to allow the verdict to stand. Therefore, the Court holds that Fidelity is entitled to a new trial on this ground as well.

B. Damage Award

The jury awarded National $566,000 in damages based on its finding that Fidelity breached the Agency Agreement. Fidelity also moves for a new trial on this finding. For the reasons that follow, the Court holds that Fidelity is entitled to a new trial on the amount of damages, if any, National sustained because of the alleged breach.

First, Fidelity is entitled to a new trial because the damage award is not supported by the evidence. Under Minnesota law, lost profit damages may be recovered "where they are shown to be the natural and probable consequences of the act or omission complained of and their amount is shown with a reasonable degree of certainty and exactness." *Edling v. Stanford Township*, 381 N.W.2d 881, 884 (Minn. Ct. App. 1986). National's evidence of damages consisted of Holstad's testimony as to National's revenues in 1992 and 1993, and his assertion that he planned to remain in business in the future.

Fidelity argued that the evidence was not sufficient for the jury to assess damages with a reasonable degree of certainty. Although the evidence was slim, the Court found it sufficient to reach the jury. However, an award of $566,000 in damages is not supported by the evidence. The award exceeds the revenues Holstad testified National made in 1992 and 1993. Given the evidence of a business downturn and the countless other factors that make predicting future profits difficult, an award of this magnitude cannot be justified as a "natural and probable consequence" of the asserted breach.

As an alternative ground for a new trial on damages, Fidelity argues that the present award is based on an erroneous damage theory. The Agency Agreement allows for termination without cause on 30 days' written notice. Thus, Fidelity argues that measure of damages for a breach of the

termination provisions must be limited to the 30-day period following the allegedly improper termination.[5]

The Court agrees. Where a contract contains a provision for termination upon notice, recovery of future profits based on a breach of those provisions is limited to the notice term specified. *In re Petroleum Carriers Co.*, 121 F. Supp. 520, 525-27 (D. Minn. 1954); *see also Western Oil & Fuel Co. v. Kemp*, 245 F.2d 633, 641 (8th Cir. 1957) (holding that the measure of damages for breach of a contract terminable upon notice is the damages sustained during the notice period); *Machine Maintenance & Equipment Co., Inc. v. Cooper Industries, Inc.*, 634 F. Supp. 367, 371 (E.D. Mo. 1986) (holding that breach of contract damages were limited to 90 days following a breach of the termination provision of the contract where the contract could be terminated without cause on 90 days' notice).

The discussion in *Machine Maintenance & Equipment Co., Inc. v. Cooper Industries*, 634 F. Supp. 367 (E.D. Mo. 1986) is instructive. *Machine Maintenance & Equipment* involved a contract between a distributor and manufacturer. The distributor sued the manufacturer for breach of contract and wrongful termination. Because the alleged breach of contract was the failure to comply with the termination provisions, the Court held that the distributor was limited to damages flowing from that breach - namely, the lost profit damages it sustained in the 90 days following the termination. *Id.* at 371. The Court explained:

> [P]laintiff can only recover damages resulting from or incidental to the alleged breach, which under the facts of this case is not the termination itself, but rather the failure to provide the notice called for by

[5] Fidelity did not make this argument before the jury verdict. The Court asked for additional briefing on the issue upon receipt of Fidelity's renewed motion for judgment as a matter of law or, alternatively, for a new trial.

> the terms of the agreement. Plaintiff's breach of contract claim is that defendant had no "cause" to terminate the distributorship agreement and therefore breached the agreement by providing notice of 34 days rather than of 90 days. Thus plaintiff will have to prove that any damages sought were the result of this breach, i.e., not the result of the termination itself but of the shortened period of notification.

Id. This rule prohibits a party from recovering damages beyond the expected legal life of the contract. *See Western Oil & Fuel,* 245 F.2d at 640; *Petroleum Carriers,* 121 F. Supp. at 527.

In light of this authority, it is clear that National is not entitled to recover damages beyond the 30-day period following the termination. Moreover, the measure of damages is limited to any damage flowing from the alleged failure to comply with the termination provisions.

National argued to the jury that Fidelity was responsible for putting it out of business. National also claimed it was entitled to lost profit damages for an unspecified period of time into the future. Plainly, this theory of damages does not comport with the measure of damages National is entitled to recover if it establishes a breach of the termination provisions under the above case law. Unfortunately, it would be impossible for the Court to reduce the damage award to comport to the proper measure of damages after the fact. National remained in business during the 30 days following the termination, and it did not present any evidence that would allow the fact finder or the Court to determine the amount of damages, if any, it might have sustained during that period. Consequently, the amount of National's damages must be retried along with the issue of Fidelity's liability. In the trial, National's damages will be limited to the 30 days following the alleged wrongful termination in accordance with the law cited in this opinion.

C. Breach of the March 29, 1995 Agreement

Fidelity's motion also concerns the jury's finding that Fidelity breached the March 29, 1995 Agreement. The jury found that Fidelity breached the March Agreement but did not award any damages. Fidelity argues that National did not present evidence that would allow the jury to conclude that it breached the March Agreement. Therefore, Fidelity contends a new trial is justified.

The Court need not consider the merits of Fidelity's argument. Even if Fidelity is correct, the jury did not assess any damages, and the Court cannot conclude that a new trial is required to avoid a miscarriage of justice. Accordingly, Fidelity's motion for a new trial on this finding is denied. However, to avoid any prejudice to Fidelity, the Court is not inclined to admit evidence of the jury's finding in the new trial.

D. Fidelity's Conversion Claim

Finally, Fidelity seeks a new trial on its conversion claim. Fidelity argues that no reasonable jury could have concluded that defendants did not convert its property.

The Court disagrees. Although the jury could have concluded that defendants converted funds belonging to Fidelity, the evidence did not compel that conclusion. Thus, the verdict is not "seriously erroneous" such that would warrant a new trial. Consequently, Fidelity's motion for a new trial on this claim is denied.

E. Conclusion

In sum, Fidelity's motion for a new trial is granted as to two issues:

1. Whether Fidelity breached the termination provisions in the Agency Agreement when it terminated National; and
2. If Fidelity breached the termination provisions, what damages, if any, did National sustain during the 30 days following the termination.

The Court vacates the $566,000 judgment in favor of National and orders a new trial on these issues.

III. Motions for Attorneys' Fees, Costs and Interest

Also pending are the parties' motions for attorneys' fees, costs and interest. Defendants move for an award of $247,540.59 in attorneys' fees and costs under Fed. R. Civ. P. 54(b) and the Agency Agreement. In light of the Court's ruling on Fidelity's motion for a new trial, defendants' motion for an award of attorneys' fees, costs and interest is denied.

Fidelity moves for an award of the attorneys' fees and costs it incurred from March 31, 1998 through trial, including prejudgment and post judgment interest.[6] In support of the motion, Fidelity has presented evidence that it incurred $98,655.95 in attorneys' fees and costs from March 31, 1998 through June 30, 1998.

Fidelity's motion is based on Fed. R. Civ. P. 54 and the Agency Agreement. Paragraph 14A of the Agency Agreement provides:

> Agent agrees to and shall pay al [sic] charges, expenses, fees, and costs, including reasonable attorneys' fees, which may be incurred in the

[6] At trial, Fidelity offered proof of the attorneys fees and costs it incurred through March 31, 1998. The Court instructed the jury not to consider fees incurred after that date in calculating its award to Fidelity. In the present motion, Fidelity seeks to recover the fees and expenses it incurred from March 31, 1998 through the end of trial.

> enforcement of this Agreement, whether or not such enforcement includes litigation, together with interest from the date of expenditure at the legally permitted interest rate[.]

Fidelity commenced this action against National to enforce the Agency Agreement. The jury found that National was negligent and breached the Agency Agreement. Accordingly, Fidelity is entitled to an award of the reasonable attorneys' fees and expenses it incurred prosecuting this case, plus interest, under paragraph 14A.

National argues that Fidelity is not entitled to an award of attorneys' fees based on paragraph 14B of the Agency Agreement. That paragraph states: "If either party shall institute an action against the other for breach of this Agreement, the unsuccessful party shall pay court costs and actual attorneys' fees to the successful party." Contrary to National's assertion, this paragraph does not nullify Fidelity's right to recover fees under paragraph 14A – especially in light of the Court's ruling on the motion for a new trial.[7]

National also asserts that the amount of the attorneys' fees is unreasonable in light of the level of success Fidelity achieved. The Court has reviewed the documentation

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[7] Of course, it is possible that the jury in the new trial would find that Fidelity breached the Agency Agreement and award damages to National. However, even if that transpired, it would not change the result. Fidelity would still be entitled to recover the attorneys' fees and expenses it incurred enforcing the Agency Agreement against National under paragraph 14A. Moreover, the Court believes Fidelity would still be the "successful" party under paragraph 14B. The jury awarded Fidelity $442,648.88 in damages as a result of National's conduct. The maximum potential damages National could obtain on its counterclaim even if the jury finds liability would be substantially less. Thus, even assuming that the new jury finds liability and awards National damages for the 30 day period following the termination, Fidelity would still be the "successful" party entitled to an award of attorneys' fees and expenses under paragraph 14B.

supporting Fidelity's motion and believes that the amount of attorney's fees sought is reasonable in light of the time and effort required, the complexity of the issues, the skill of the attorneys, the value of the interest involved, and the level of success obtained.

For these reasons, Fidelity's motion for attorneys' fees, costs and interest is granted. The judgment will be amended to add an award of $98,655.95 plus interest to Fidelity pursuant to the Agency Agreement.

ORDER

Based on the foregoing, and on all the files, records and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Fidelity's renewed motion for judgment as a matter of law or, alternatively, for a new trial and to amend the judgment [Docket No. 136] is **GRANTED in part** and **DENIED in part**. The motion for a new trial is granted on two issues: 1) Whether Fidelity breached the termination provisions in the Agency Agreement when it terminated National; and 2) If Fidelity breached the termination provisions, what damages, if any, did National sustain in the 30-day period following the termination.

2. The judgment for $566,000 in favor of defendant National Title Resources Corporation is **VACATED**.

3. National's motion for attorneys' fees, costs and interest [Docket No. 138] is **DENIED**.

4. Fidelity's motion for attorneys' fees [Docket No. 142] is **GRANTED**. The judgment in favor of Fidelity National Title Insurance Company of New York is **AMENDED** to add an award of $98,655.95 plus interest to Fidelity.

5. The stay of execution imposed in the Court's July 14, 1998 Order is **LIFTED**.

6. The Court will hold a Rule 16 conference concerning the new trial, and will establish a briefing schedule for anticipated and/or pretrial submissions at that time.

Dated: September 24, 1998.

s/

JOHN R. TUNHEIM
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

FIDELITY NATIONAL TITLE INSURANCE COMPANY OF NEW YORK,

Civil No. 4-95-577

Plaintiff,

v.

VERDICT

NATIONAL TITLE RESOURCES CORPORATION and JOEL M. HOLSTAD,

Defendants.

We, the Jury in this case, make these answers to the following questions:

QUESTION 1: Did National Title Resources Corp. ("National") breach the "Issuing Agency Agreement?"

YES _X_ NO____

IF YOU ANSWERED "YES" TO QUESTION 1, PLEASE PROCEED TO QUESTION 1A.

IF YOU ANSWERED "NO" TO QUESTION 1, SKIP QUESTION 1A AND PROCEED TO QUESTION 2.

QUESTION 1A: If your answer to Question 1 is "yes," then answer this question: What amount of damages, if any,

will compensate Fidelity National Title Insurance Company of New York ("Fidelity") for the breach?

Answer: $ 233,781.11

QUESTION 2: Did National or Joel Holstad breach the March 29, 1995 agreement which includes the promissory note and unconditional guarantee?

YES ____ NO X

IF YOU ANSWERED "YES" TO QUESTION 2, PLEASE PROCEED TO QUESTION 2A.

IF YOU ANSWERED "NO" TO QUESTION 2, SKIP QUESTION 2A AND PROCEED TO QUESTION 3.

QUESTION 2A: If your answer to Question 2 is "yes," then answer this question: What amount of damages, if any, will compensate Fidelity for the breach?

Answer: $_____

Note: In answering this question, you should not consider your responses to the previous questions. If you decide that Fidelity is entitled to damages, you should state the amount you find will adequately compensate Fidelity without considering your response to any other question asking you to assess damages.

QUESTION 3: Did Fidelity breach the "Issuing Agency Agreement?"

YES _X_ NO____

IF YOU ANSWERED "YES" TO QUESTION 3, PLEASE PROCEED TO QUESTION 3A.

IF YOU ANSWERED "NO" TO QUESTION 3, SKIP QUESTION 3A AND PROCEED TO QUESTION 4.

QUESTION 3A: If your answer to Question 3 is "yes," then answer this question: What amount of damages, if any, will compensate National for the breach?

Answer: $ 566,000.00

QUESTTON 4: Did Fidelity breach the March 29, 1995 agreement?

YES _X_ NO____

IF YOU ANSWERED "YES" TO QUESTION 4, PLEASE PROCEED TO QUESTION 4A.

IF YOU ANSWERED "NO" TO QUESTION 4, SKIP QUESTION 4A AND PROCEED TO QUESTION 5.

QUESTION 4A: If your answer to Question 4 is "yes," then answer this question: What amount of damages, if any, will compensate National for the breach?

Answer: $ 00.00

Note: In answering this question, you should not consider your responses to the previous questions. If you decide that National is entitled to damages, you should state the amount you find will adequately compensate

National without considering your response to any other question asking you to assess damages.

QUESTION 5: Was National negligent in handling any of the following transactions? Please indicate your response by placing a check mark in the appropriate blank following each transaction.

DeWitt transaction	Yes X	No ___
Arndt transaction	Yes X	No ___
Lake Elmo transaction	Yes X	No ___
Construction Mortgage Investors Corporation transaction	Yes X	No ___
Blood transaction	Yes ___	No X
Pogue transaction	Yes ___	No X
Builders Development transaction	Yes ___	No X

IF YOU ANSWERED "YES" TO ANY OF THE TRANSACTIONS LISTED IN QUESTION 5, PLEASE PROCEED TO QUESTION 5A.

IF YOU ANSWERED "NO" TO ALL THE TRANSACTIONS IN QUESTION 5, SKIP QUESTION 5A AND PROCEED TO QUESTION 6.

QUESTION 5A: If you answered "yes" to any of the transactions listed in Question 5, answer this question: What amount of damages, if any, will compensate Fidelity for National's negligence?

Answer: $ 208,867.77

Note: In answering this question, you should not consider your responses to the previous questions. If you decide that Fidelity is entitled to damages, you should state the amount you find will adequately compensate Fidelity without considering your response to any other question asking you to assess damages.

QUESTION 6: Did Edward Oesch act solely as an agent for Fidelity?

YES _____ NO_X__

IF YOU ANSWERED "YES" TO QUESTION 6, PLEASE PROCEED TO QUESTION 6A.

IF YOU ANSWERED "NO" TO QUESTION 6, SKIP QUESTIONS 6A AND 6B AND PROCEED TO QUESTION 7.

QUESTION 6A: If your answer to Question 6 is "yes," then answer this question: Was Edward Oesch negligent?

YES _____ NO_____

IF YOU ANSWERED "YES" TO QUESTION 6A, PLEASE PROCEED TO QUESTION 6B.

IF YOU ANSWERED "NO" TO QUESTION 6A, SKIP QUESTION 6B AND PROCEED TO QUESTION 7.

QUESTION 6B: If your answer to Question 6A is "yes," then answer this question: What amount of damages, if any, will compensate National for Edward Oesch's negligence?

Answer: $_____

Note: In answering this question, you should not consider your responses to the previous questions. If you decide that National is entitled to damages, you should state the amount you find will adequately compensate National without considering your response to any other question asking you to assess damages.

QUESTION 7: Did National convert property belonging to Fidelity or its customers according to the elements described in Instruction No. 28?

YES _____ NO_X__

IF YOU ANSWERED "YES" TO QUESTION 7, PLEASE PROCEED TO QUESTION 7A.

IF YOU ANSWERED "NO" TO QUESTION 7, SKIP QUESTION 7A AND PROCEED TO QUESTION 8.

QUESTION 7A: If your answer to Question 7 is "yes," then answer this question: What amount of damages, if any, is Fidelity entitled to recover because of the conversion?

Answer: $_____

Note: In answering this question, you should not consider your responses to the previous questions. If you decide that Fidelity is entitled to damages, you should state the amount you find will adequately compensate Fidelity without considering your response to any other question asking you to assess damages.

QUESTION 8: Did Joel Holstad convert property belonging to Fidelity or its customers according to the elements described in Instruction No. 28?

YES ____ NO X

IF YOU ANSWERED "YES" TO QUESTION 8, PLEASE PROCEED TO QUESTION 8A.

IF YOU ANSWERED "NO" TO QUESTION 8, YOU MAY SKIP QUESTION 8A.

QUESTION 8A: If your answer to Question 8 is "yes," then answer this question: What amount of damages, if any, is Fidelity entitled to recover because of the conversion?

Answer: $_____

Note: In answering this question, you should not consider your responses to the previous questions. If you decide that Fidelity is entitled to damages, you should state the amount you find will adequately compensate Fidelity without considering your response to any other question asking you to assess damages.

s/ Randall J. [illegible] 6-30-98

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Fidelity National Title Insurance Company of New York,

Plaintiff,

vs.

National Title Resources Corporation and Joel M. Holstad,

Defendants.

CIVIL 4-95-577 (JRT/RLE)

June 2, 1998, Transcript of Proceedings (Final Pre-trial Conferences), pp. 5-10. Before the Honorable John R. Tunheim, United States District Court Judge.

On behalf of Plaintiff: James A. Beitz

On behalf of Defendants: Gary B. Bodelson

[Excerpt from pages 5-10]

Okay. First of all, the first motion that I have in front of me here is the plaintiff's motion to prohibit introduction of the oral statements relative to the contract between National and Fidelity. Anything further anyone wishes to argue on this? As I indicated, we've looked at the written materials. Anything else that I should know about on this one?

MR. BEITZ: Your Honor, I would only ask the opportunity to make a very brief reply to the response made by defendants. Do you wish me to argue from here?

THE COURT: I think at this hearing, since everyone is going to be jumping up and down, why don't just stay at the table and you can be seated. Actually, those microphones do work if you -- the ones that are on the table there. If they have a red light on, they're working. That will at least partially pick you up. During the trial, of course, we'll work only from the podium. But during this hearing, this is fine.

Go ahead, Mr. Beitz.

MR. BEITZ: Your Honor, the defendants have responded to our motion to limit oral testimony on the March 1995 agreement -- that's one of the agreements between the parties -- on the grounds that the agreement is ambiguous because it does not contain any reference to consideration. And they seek to introduce apparently evidence related to that issue.

I would suggest to the Court that on the face of the agreement the consideration is very clear. It says that Fidelity can, given the admitted breach of the contract, terminate the contract and take over the files and business records of National as they relate to Fidelity's business.

And it is electing not to do that at that time. And as a matter of fact, it continued the issuing agency agreement for another four months. So the argument that there is no reference or content of consideration I think is not true. It's

clear from the face of the document that what Fidelity was doing was not terminating the agreement, as long as National continued to live up to the March agreement as well as the underlying issuing agency agreement.

THE COURT: Anything further?

MR. BODELSON: Well, Your Honor, apparently, the plaintiff's position changed, because in its brief it specifically said there would be no promises.

And then secondly, they did in fact terminate the agreement, I think the day after, two days after the agreement was entered, which is one of the problems in this case. They sent out a notice to all the lenders and all the people that the defendant dealt with indicating that they were no longer the underwriter for the defendant, which caused a great deal of difficulty, obviously, in this small community of title insurance business. It caused significant damages. I mean, they breached their agreement the day after the agreement was entered into.

And if in fact the defendant is now admitting that they did have an obligation of same sort to keep the agency agreement intact as part of their consideration of that March 29, 1995 agreement, then I guess we have no disagreement on that issue.

There was an obligation on their part to keep that agreement intact. And if that's going to be stipulated to by the plaintiff, then I guess we've got no problem.

We shouldn't have to admit parol evidence one way or the other, because they have admitted now that they did have an obligation to keep that agreement intact. And they did not do that.

I guess I just want to make clear on the record that if they're stipulating that there is that provision in the agreement that they had an obligation as part of their consideration to keep the original agency agreement intact, I would like to have that clearly made on the record.

THE COURT: Mr. Beitz?

MR. BEITZ: Your Honor, I think I made clear before, I think the agreement is clear on its face. Fidelity had agreed so long as -- Fidelity agreed not to terminate agreement the day they entered it -- not to terminate the underlying agreement the day they entered into the March agreement, provided National lived up to that agreement.

We would admit to the Court that approximately at that time -- I don't recall if Mr. Bodelson is right in terms of his time -- but very close in time to making the March agreement, we did send out a notice that was a mistake. And we set out virtually within 24 hours of that notice a retraction of the notice to those persons with whom we had issuing -- excuse me, the lenders with whom we had agreements with respect to this agent.

We did send that cancellation out, and we retracted it within a very short time.

But that goes to whether we breached that agreement or not. I suppose if they want to contend that, which I believe they have, we aren't here trying to avoid that. We're just here trying to avoid their attempts to enter parol evidence or oral evidence to contradict the terms of the agreement on their face.

THE COURT: The alleged parol evidence here, as I understand it, it doesn't really provide for a term. It just provides for this promise not to terminate the underlying agreement? Is that correct?

MR. BODELSON: Yes, in general, Your Honor.

And I tend to agree with plaintiff's counsel here in that there was a generalized agreement that as long as we maintained our end of the bargain under that March 29 agreement, they would keep intact the original agency agreement. We kept our end of the bargain. They did not.

I guess I was somewhat confused by the way they wrote their brief, indicating that they did not have any obligation to keep any kind of a promise whatsoever. And that was the point of my response in the brief.

But apparently, that's not the case. They do admit there was an obligation on their part to keep intact the original agreement.

THE COURT: Well, if I'm hearing you both of you correctly, there was an agreement, part of this agreement was to forego remedies that Fidelity may have had at the moment, provided that National lived up to the agreement. And that seems to be part of the contract itself.

Is that correct, Mr. Beitz?

MR. BEITZ: That's correct, your Honor.

THE COURT: And that seems to me essentially what you're trying to introduce by this issue. Is that correct?

MR. BODELSON: Well, not only that they forego remedies, but they that they would not terminate the contract.

We're not only concerned with the fact that they weren't going to sue us and get damages, and whatever, but they weren't going to go and tell the community that Mr. Holstad and his company were out the door. We aren't going to deal with these people anymore. Because that's exactly what happened, and it caused a significant amount of damage.

THE COURT: And you are referring to what happened a couple of days, as Mr. Beitz it calls it, the mistaken notice that was sent out?

MR. BODELSON: Yes. And you can't put toothpaste back in the bottle after it's out.

THE COURT: Well, I guess that's certainly a viable issue relative as to whether there was a breach of that agreement.

I'm trying to determine whether there is any need for additional testimony beyond the contract itself, when we seem to agree as to what the contract required. Are we agreeing right now?

MR. BODELSON: If I understand the plaintiff correctly, then we do agree.

THE COURT: It seems like it, at least to the Court. Okay. Well, that should take care of that issue.

Now, with respect to the plaintiff's motions relative to various defendants and the evidence not previously identified. Let's see, I think -- I've divided this into a number of categories on exhibits, and then on introduction of witnesses and expert witnesses.

Let's take the exhibits here first. I think exhibit one is the first one raised. This is a computer

* * *

AGREEMENT

WHEREAS, Fidelity National Title Insurance Company of New York ("Fidelity') and National Title Resources Corp. ("National") are parties to that certain "Issuing Agency Agreement" dated July 1, 1994; and National and Fidelity's predecessor entity were parties to a prior agency agreement(s) and

WHEREAS, National has defaulted under the Agency Agreement by, among other things, taking fiduciary funds held in escrow accounts; and

WHEREAS, the Agency Agreement provides that under such circumstances of default Fidelity may, among other things, terminate the Agency Agreement and take immediate possession of all of its property in National's possession, including, without limitation, all title policies, all title files in which Fidelity Title is involved, all executed and unexecuted title insurance policies, binders and endorsements, and to cancel all currently outstanding insured closing letters; and

WHEREAS, National and its president, Joel Holstad, have given Fidelity various securities to secure a note payable to Fidelity intended to reimburse the above referred escrow shortage, copies of which are attached hereto as Exhibit A ("Security Documents"); and

WHEREAS, the parties desire to give further assurances to Fidelity of the good intentions of National and to further safeguard and manage the escrow accounts of National,

NOW THEREFORE, the parties hereto agree as follows:

1. National and Holstad will disclose all of its bank accounts, including the files and records related to those accounts, signature cards and bank statements,

2. National and Holstad will immediately turn over all escrow related banking responsibilities related to Fidelity insured transactions to a manager, receiver or agent approved by Fidelity and will sign and or cause to be signed all documents necessary to transfer check signing and other

monetary authority for such accounts to such entity or individual; and

3. National and Holstad will continue to cooperate with Fidelity and the appointed manager in conducting any necessary accounting or auditing procedures, and will further cooperate in locating all insurance policies issued on Fidelity documents, all Fidelity commitments for insurance policies and all other contractual undertakings of Fidelity and/or any of it's related entities, and will make all files and records related to such policies, commitments, and other documents available to Fidelity for it' review and disposal, disbursement, or other handling as Fidelity sees fit; and

4. National and Holstad will continue all reasonable efforts to fund the shortages of any and all escrow accounts holding funds for the benefit of Fidelity, it's insured, or any other interested entity; and

5. National and Holstad will cooperate in obtaining and transferring to Fidelity sufficient security to fully secure the funding of any and all shortages in all escrow accounts containing funds for the benefit of Fidelity, it's insured, or any other interested entities, including the classification of the status of previously provided security interests, and additional security as deemed necessary by Fidelity.

FIDELITY NATIONAL TITLE INSURANCE COMPANY OF NEW YORK

By: s/Jeffrey R. Street
Its: VICE PRESIDENT

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

The foregoing instrument was acknowledged before me this day of 29th day of March, 1995, by Jeffrey R. Street the

Vice President of Fidelity National Title Insurance Company of New York, a New York corporation, on behalf of the corporation.

s/Frederic W. Knaak
Notary Public

NATIONAL TITLE RESOURCES CORPORATION

By: s/Joel Holstad
Its: President

STATE OF MINNESOTA)
) *ss.*
COUNTY OF RAMSEY)

The foregoing instrument was acknowledged before me this day of 29th day of March 29, 1995, by Joel Holstad the President of National Title Resources Corporation, a Minnesota corporation, on behalf of the corporation.

s/Frederic W. Knaak
Notary Public

UNCONDITIONAL GUARANTY

Joel Holstad, the president of National Title Resources Corporation, with an extensive economic interest in the well-being and stability of National Title Resources Corporation, and as an inducement to Fidelity's entering into and agreeing to the terms of the foregoing agreement, does hereby unconditionally guaranty performance by National Title Resources Corporation of the terms and conditions set forth in the foregoing agreement.

s/_____
Joel Holstad

Subscribed and sworn to before me
this 29th day of March, 1995.

s/Frederic W. Knaak
Notary Public

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-2289

Fidelity National Title Insurance Company of New York, a New York corporation,	*	
Appellee,	*	
v.	*	Appeal from the United States District Court for the District of Minnesota.
National Title Resources Corporation, a Minnesota corporation,	*	
Appellant.	*	

Submitted: February 12, 2001
Filed: August 16, 2001

Before RICHARD S. ARNOLD and HANSEN, Circuit Judges, and KORNMANN,[1] District Judge.

HANSEN, Circuit Judge.

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[1] The Honorable Charles B. Kornmann, United States District Judge for the District of South Dakota, sitting by designation.

National Title Resources Corporation (National) appeals the district court's[2] grant of summary judgment in favor of Fidelity National Title Insurance Company (Fidelity) in this breach of contract case. We affirm.

I.

Fidelity and National entered into an issuing agency agreement (agency agreement) on July 1, 1994. By this agreement, National, a Minnesota based company, issued title insurance policies underwritten by Fidelity, a New York corporation. The agency agreement required National to maintain fiduciary funds in escrow accounts and provided that either party could terminate the agreement without cause upon 30 days notice or that Fidelity, in its sole discretion, could terminate the agreement at any time in the event of default. The agency agreement defined events of default to include deficiencies in National's trust accounts or its failure to perform any conditions or obligations of the agreement. Fidelity discovered shortages in National's escrow accounts, and as a result the parties entered into another agreement on March 29, 1995, to address those shortages (March agreement). In the March agreement, National admitted to defaulting under the agency agreement and agreed to secure a note payable to Fidelity to reimburse the escrow shortages as well as to disclose bank account records, turn over escrow-related banking responsibilities, and cooperate with accounting and auditing procedures. On June 20, 1995, Fidelity terminated the agency agreement with National, stating that National had not turned over all escrow-related banking responsibilities and had not made up the escrow shortages.

---

[2] The Honorable John R. Tunheim, United States District Judge for the District of Minnesota.

Fidelity brought suit against National for breach of contract, negligence, conversion, and breach of a personal guarantee. National counterclaimed for breach of contract by Fidelity and for various torts. The jury found that National had breached the agency agreement and was negligent in its handling of three real estate transactions, awarding damages of $233,781.11 and $208,867.77, respectively. The jury also found that Fidelity had breached the agency agreement and awarded National damages in the amount of $566,000 on its counterclaim. The district court granted Fidelity's motion for new trial on the issues of whether Fidelity had breached the agency agreement when it terminated National, and if so, what damages were sustained by National. The district court vacated the $566,000 counterclaim judgment in favor of National. During further discovery in preparation for the new trial, National announced that it would not offer any new evidence on the issue of Fidelity's liability. Fidelity then filed a motion for summary judgment, and the district court granted the motion and dismissed National's counterclaim for breach of contract. National appeals.

II.

We review the grant of summary judgment de novo. Coplin v. Fairfield Pub. Access Television Comm., 111 F.3d 1395, 1401 (8th Cir. 1997). In conducting our review, we evaluate the record in the light most favorable to the nonmoving party. Id. Summary judgment is appropriate only when there is "'no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.'" Id. (quoting Fed. R. Civ. P. 56(c)).

National asserts that the district court erred in granting Fidelity's motions for new trial and for summary judgment because Fidelity waived its right to terminate the agency agreement when it entered into the March agreement and, by terminating the agency agreement, Fidelity breached its

contract with National. We disagree. Nothing in the March agreement indicates any obligation on the part of Fidelity to refrain from terminating the agency agreement, nor does it waive Fidelity's rights to terminate the agency agreement for the defaults already admitted to by National in the March agreement. The March agreement appears to be simply an attempt to offer security to Fidelity after an acknowledgment by National that National had defaulted under the agency agreement. The March agreement itself was sufficient evidence for the jury to conclude that National had breached the agency agreement, thus giving Fidelity the right to terminate without notice. In addition, the president of National, Joel Holstad, admitted in a letter to Fidelity dated January 13, 1995, that shortages in the escrow account existed. (See Appellee's Add. at 26). These shortages gave Fidelity cause to terminate the agency agreement immediately. However, the fact that Fidelity entered into the March agreement does not support the jury's finding that Fidelity also breached the agency agreement. Unlike National, Fidelity did not acknowledge in the March agreement that it had breached the agency agreement. Additionally, National did not argue to the jury that Fidelity breached the agency agreement prior to entering into the March agreement. National's admitted default of the agency agreement constituted a breach of the agreement which gave Fidelity the right to terminate. The fact that Fidelity gave National the opportunity to correct its default by entering into the March agreement did not waive Fidelity's right to terminate, nor did it waive National's default. Fidelity's termination of the agency agreement in response to National's default did not constitute a breach of contract. The jury's verdict on the counterclaim was seriously erroneous and a miscarriage of justice; as a result, the district court's grant of the motion for new trial in this situation was proper. See Leichihman v. Pickwick, Int'l, 814 F.2d 1263, 1267 (8th Cir.), cert. denied, 484 U.S. 855 (1987). Once National made

it known that it did not intend to offer any new evidence of a breach of the agency agreement by Fidelity, the district court properly granted Fidelity's motion for summary judgment, and Fidelity was entitled to judgment as a matter of law.

National also asserts that Fidelity was not entitled to indemnity for claims without a tender of defense and without allowing National to participate in the claims resolution process. The agency agreement specifically provided that National would be liable for all losses attributable to National's negligence and that Fidelity would have the authority to defend, settle, or dispose of any claims. Although not required to do so by the agency agreement, Fidelity did in fact offer a tender of defense to National by letter dated January 10, 1996. (See Appellant's App. at 332.) The agency agreement gave Fidelity the sole authority to dispose of claims, and this authority is stated in clear and unequivocal terms and, thus, comports with public policy. See Oster v. Medtronic, Inc., 428 N.W.2d 116, 118 (Minn. Ct. App. 1988).

Finally, National contends the district court erred in allowing an award of attorneys' fees to Fidelity and asserts that because it received a greater jury award than Fidelity, that National was the prevailing party. We disagree. Section 14(a) of the agency agreement specifically required National to pay all attorneys' fees and expenses incurred in enforcing the agreement, regardless of whether National was the prevailing party. (See Appellant's App. at 150.) Additionally, we fail to see how National can be viewed as the prevailing party in light of the district court's order vacating the jury award to National and the grant of Fidelity's motion for summary judgment.

III.

For the foregoing reasons, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Fidelity National Title Insurance Company of New York,	CIVIL 4-95-577 (JRT/RLE)
Plaintiff,	
vs.	
National Title Resources Corporation and Joel Holstad,	Minneapolis, Minnesota
	June 23, 1998
Defendants.	11:10 o'clock a.m.

TRANSCRIPT OF TRIAL, Volume 7 of 9

BEFORE THE HONORABLE JOHN R. TUNHEIM,
(and a jury)
UNITED STATES DISTRICT COURT JUDGE.

APPEARANCES:

On behalf of plaintiff:	James A. Beitz Michael C. Hagerty
On behalf of defendants:	Frederic W. Knaak Gary B. Bodelson

Court Reporter:

Karen J. Grufman
U.S. Courthouse, Suite 1005
Minneapolis, MN 55415
612-664-5105

[Excerpt from Holstad-Direct, pages 1101-1102]

Q. There are no other shareholders in the company. Is that you true?

A. Correct, there are no other shareholders.

Q. So as a shareholder, you have an expectation, do you not, in that company in terms of any increase in value of those shares as a result of good business?

MR. BEITZ: Objection, leading, Your Honor.

THE COURT: Objection sustained. It is leading.

BY MR. KNAAK:

Q. There aren't any other owners of National Title. Isn't that right?

A. No, there are no other owners.

Q. And there was, by your testimony, a profit of about $200,000 in '94. Isn't that right?

A. Yes.

Q. Do you recall what that profit was in '93?

A. In '93, it was in excess of $500,000.

Q. And in '92?

A. In '92, it would have been in the area of $350,000, $400,000.

Q. Did you receive any awards as the result of your participation in that business?

A. Yes, a number of them.

Q. What were they?

A. National Title and myself were listed on the 500 list of fastest growing companies in America. We were ranked 140th of the top 500 companies. And that is something I am and we were very proud of.

I was also a finalist in the Minnesota Ventures' ranking for Minnesota Entrepreneur of the Year. I came in second to Ralph Burnet.

I was also, at around the same time, chosen as Minnesota Business and Professional Women Employer of the Year.

Q. Did you receive a salary while you were employed there?
A. Yes, I did.
Q. Do you recall what your salary was in 1992?
A. My base salary was $72,000.
Q. What about 1993?
A. My base salary remained the same.
Q. What did you receive?
A. $72,000.
Q. What about 1994?
A. My salary was the same, but I was, I did not take salary in November or December.
Q. So do you recall the total amount you were paid for that year?
A. Approximately $60,000.
Q. Do you recall what you were paid in 1995?
A. I didn't receive anything for the first half of 1995. I believe I took, as salary in the second half of 1995, $10,000.

* * *

[Excerpt from Holstad-Direct, pages 1122-1128]

THE COURT: Why don't you come on up here.

(The following bench conference was had out of the hearing of the jury:)

THE COURT: What is the basis for this? His observation?

MR. KNAAK: His observation. His own review and discussion with the staff. I'm prepared to drop this line of inquiry.

MR. BEITZ: Thank you, Your Honor.

(End of bench conference.)

BY MR. KNAAK:

Q. Mr. Holstad, you were present, were you not, when there was discussion of a meeting that occurred in March of 1995 between yourself and some representatives of Fidelity? Is that correct?

A. Yes.

Q. Could you describe for us your recollection of what occurred at that meeting?

A. At that meeting, I was presented with numerous documents and told if I did not execute the documents that they would close me down.

Q. Do you recall the date of that meeting?

A. March 28 or March 29.

Q. And I'm going to show you --

MR. KNAAK: May I approach the witness, Your Honor?

THE COURT: You may.

BY MR. KNAAK:

Q. Mr. Holstad, I'm showing you what's been entered as exhibit, actually plaintiff's exhibit 16. Do you recognize that document?

A. Yes, I do.

Q. What is it?

A. It is the agreement that was executed in March of 1995.

Q. Was that one of the documents you were just referencing in your testimony about the meeting in March?

A. Yeah. This is the document.

Q. And what was your understanding of Fidelity's obligation in that agreement?

MR. BEITZ: Objection, Your Honor. This violates the Court's pretrial order.

MR. KNAAK: Your Honor, may we approach?

THE COURT: Come on up.

(The following bench conference was had out of the hearing of the jury:)

THE COURT: What is his testimony on this?

MR. KNAAK: I want entered into the record his understanding, Your Honor, and in fact the position that Fidelity has testified to, Fidelity had an obligation to continue to allow him to stay in business. Nothing more.

MR. BEITZ: The agreement speaks for itself. The Court already ruled. It's clear on it's face. Him testifying to the meaning is totally beyond the scope of the parol evidence.

MR. KNAAK: Your Honor, we've heard a substantial amount of testimony from the plaintiff's witnesses on this topic.

THE COURT: He's not going to testify as to a particular time they told him they would keep him in business?

MR. KNAAK: No.

MR. BEITZ: As long as he's going to testify that Fidelity, in this agreement, that they could shut him down that day and they didn't, I don't have a problem. If he says they would keep him open beyond that day --

MR. BODELSON: That's not been ruled --

MR. BEITZ: The contract is clear on its face. You can't interpret it to --

MR. BODELSON: The contract does not say that anywhere. That's the problem. That's absolutely an absurd position to take. We're not going to --

THE COURT: Well, tell me again what you anticipate him to say.

MR. KNAAK: What I anticipate he's going to say is it was his understanding he was going to state what Fidelity promised was that he could stay in business.

THE COURT: Period?

MR. KNAAK: Period.

MR. BEITZ: The agreement says what the agreement says. That's what the parol evidence rules are. The Court already ruled on that. And to allow him to say what his opinion was or interpretation of the agreement was, stay in business sounds different than stay in business for one day. And the Court correctly stated in the motion in limine what Fidelity did. It decided not to cancel the contract. That was the consideration on that day.

MR. BODELSON: That's not what the Court ruled.

THE COURT: Well, it doesn't have a time period. It doesn't promise to allow him to stay in operation for 30 days or 60 days --

MR. BODELSON: That's fine but --

THE COURT: But clearly part of the intent of the contract was to allow him to continue for some period of time, whether it be for two years, or two days, or three weeks, or however long. Maybe the best way is just in gender, get that kind of response, tend to allow him to keep going.

MR. BEITZ: Then I can't cross examine him on that. I think the contract is clear. The jury needs to read the contract. That's what I thought your ruling was.

And the interpretation of it. First of all, it doesn't need interpretation. The contract is clear. That's what the jury gets to see is the contract. Not his interpretation of or his feeling about it. It's what the contract says.

MR. BODELSON: Your Honor, we listened for an hour to Mr. Perna what the terms of the contract were. He's opened the door and now he wants to shut it.

THE COURT: I'm going to let him answer the question as anticipated here. I don't want him testifying it was his understanding it was going to be 90 days, or 120 days. Because that would violate the express term of the contract.

(End of bench conference.)

THE COURT: You may continue, Mr. Knaak.

MR. KNAAK: Thank you, Your Honor. Could I have the reporter read the question?

(The last question was read back.)

THE WITNESS: They were not going to cancel the contract and they were going to allow me to exist.

BY MR. KNAAK:

Q. Now, we had testified earlier -- or you had testified earlier about the insured closing letters. Isn't that right?

A. Yes.

Q. Do you recall during this meeting with Fidelity officials whether that subject ever came up?

A. Insured closing letters only came up in the "whereas" clause of this agreement. Where they indicated that they had a right to cancel insured closing letters. And it's one of those things that I was, and probably the primary thing that I was trying to avoid have happen.

Q. Did you have any reason to know whether any action had already been taken by Fidelity with respect to your insured closing letters?

A. I had been communicated that no action had been taken regarding Fidelity's rights under the contract.

Q. By whom?

A. By Jeff Street. And that was the reason that I was willing to consider signing this agreement.

Q. So at the time of the meeting, you had no reason to believe that your insured closing letters might have been canceled?
A. I had no reason, no.
Q. what then, if anything, happened with respect to the insured closing letters?
A. Within a couple of minutes after the execution, I was told that, by Jeff Street, that the insured closing letter cancellations had been inadvertently mailed out the day before.
Q. This was after you had signed the contract?
A. Yes.
Q. What impact, if any, did that action have on your business?
A. I had an immediate rash of closing cancellations for files already scheduled to close. Files scheduled to close the 30th of March, 31st of March. And a large number of files canceled that were supposed to close in April, as well as pending title applications canceling.
Q. Do you have any reason to know the reason for these cancellations?
A. Yes.

MR. BEITZ: Objection, Your Honor. Calls for hearsay. Lack of foundation.

THE COURT: Objection overruled as to this particular question, which asks whether he had any reason to know.

THE WITNESS: Yes.

BY MR. KNAAK:

Q. And what was that reason?

MR. BEITZ: Objection, Your Honor. Lack of foundation, hearsay. Now he's asking for the conclusion.

MR. KNAAK: I'm asking for the basis.

THE COURT: Objection sustained. Ask him how he got this knowledge first, perhaps.

BY MR. KNAAK:

Q. You indicated that you had reason to know. Isn't that correct?
A. Yes.
Q. How?
A. I contacted a number of the parties that had canceled and I asked them why.
Q. And that's what they told you?

* * *

[Excerpt from Street-Direct, page1394]

Q. So it was your impression that they treated National Title with contempt? Is that your word?
A. I would say, yeah, I would say not just National, but any agency that they felt didn't live up to their standards.
Q. So National merited contempt, in your view.

And you also testified, correct me if I'm wrong, that they were holding National out as an example in this case?
A. I think they wanted to have an example. Or someone that they could point to, or a company that they could point to and say this is what we do.
Q. This is what we do in cases where there are alleged shortages? That kind of example?
A. Uh-huh.
Q. It was your impression that's what was occurring here?
A. Uh-huh.
Q. Do you think National deserves to be taught a lesson in this case?
A. I think that there are issues that should have been resolved, and issued that were being resolved. I think that there were definitely shortages from a recording standpoint, definitely shortages from a premium standpoint. Perhaps a couple of other losses that as of yet, or when I, left were still not nailed down. And those things should have been and needed to be resolved.

But the further we got into it and the more I found

* * *

[Excerpt from States-Cross, page 267]

A. Yes.
Q. So was it your observation that National had lost business as a result of its problems with Fidelity?

MR. BEITZ: Objection, Your Honor. Lack of foundation.

MR. KNAAK: He's testified that he was there, Your Honor.

THE COURT: Objection overruled. He can testify if he can.

THE WITNESS: Yes.

BY MR. KNAAK:
Q. And so there was a diminishment in business, but nevertheless, the only outstanding, in your observation, the only outstanding problems that were in accounting were Fidelity accounts. Is that right?
A. That's correct.
Q. Now, did you contact Fidelity on a regular basis?
A. Yes.
Q. Who was your contact, if anyone, there?
A. Two people primarily, Jeff Street, and Paul Hunsinger.
Q. So both Mr. Hunsinger, who testified earlier, and Mr. Street, would have been the persons that you would have been contacting on a regular basis?
A. Yes.
Q. And you were informing them of the progress of what was

* * *

[Excerpt from States-Cross; States-Redirect, pages 269-270]

Q. Anyplace else you can think of?
A. Duluth. I'm not sure what the relationship from an ownership standpoint was with that office. Those were I think all of them.
Q. But the Duluth office was another office that was identified with National Title anyway?
A. Yes.
Q. Did you yourself have any occasion to talk about possibly becoming an agent in any of those offices?
A. Yes.
Q. Could you describe for me what it was that led to that?
A. We were looking at the business in the Coon Rapids office. And which was predominantly, well, I think a hundred percent Fidelity business. And I talked with Jeff Street, and of course Joel was working with the situation, for me to actually become an agent, and in essence take over that office.
Q. So the discussion that you were having was basically to take over an office with Jeff Street, and that office would have been the Coon Rapids office. Is that right?
A. I'm sorry, it would have been?
Q. The Coon Rapids office?
A. Yes, that's correct.
Q. So that would become your agency. Is that right?
A. Yes.
Q. And did you attempt to do that?
A. We got real close to doing it, but the deal basically fell apart.
Q. Isn't it true that you actually went there and --
A. I was physically in the office for a week or so, yes.
Q. And you announced that you were the agent there, or that you were going to be the agent?
A. That we were in discussion, yes.
Q. And the employees left. Isn't that right? . . . .

A. There was some interesting things that happened, that is correct.

Q. And that was one of the interesting things --

A. Yes.

Q. -- that people left. And as a result, the Coon Rapids office shut down?

A. Yes.

Q. So that business was lost to both Fidelity and National. Is that correct?

A. That's correct.

MR. KNAAK: I think that's enough, Your Honor. Thank you.

THE COURT: Mr. Beitz, redirect?

MR: BEITZ: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. BEITZ:

Q. Do you have exhibit ten there, Mr. States?

* * *

Supreme Court, U.S.
FILED
JAN 2 2002
CLERK

(2)

No. 01-789

IN THE

Supreme Court of the United States

NATIONAL TITLE RESOURCES CORP.,

Petitioner,

v.

FIDELITY NATIONAL TITLE INSURANCE COMPANY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

JAMES A. BEITZ
Counsel of Record
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QUESTION PRESENTED FOR REVIEW

Whether this Court should review the decision of the court of appeals, which affirmed summary judgment on the Petitioner's cross-claim for improper termination of an agency contract, where the Petition does not raise any unique issues of federal law or contend that the court of appeals' decision rests on a ruling in conflict with any other circuit or state court of last resort?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

1. *Parties*. Joel M. Holstad ("Holstad") was a party to the underlying action because Respondent Fidelity National Title Insurance Company of New York ("Fidelity") sued him personally on his personal guarantee. The jury, however, did not find Holstad personally liable, and neither Fidelity nor Holstad appealed that finding. Holstad did not personally pursue any cause of action against Fidelity. The counter-claim in this action was brought solely by Petitioner National Title Resources, Inc. ("National"). Indeed, the only relief sought in the Petition for Writ of Certiorari relates to claims that belong to National. Therefore, Petitioners have improperly identified Holstad as a Petitioner.

2. *Statement Pursuant to Rule 29.6*. Fidelity National Title Insurance Company of New York is wholly owned by Fidelity National Financial Inc., a publicly traded company.

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STATEMENT OF THE CASE

For purposes of this Brief in Opposition, Fidelity adopts and incorporates by reference the facts set forth in the reported opinion rendered by the United States Court of Appeals for the Eighth Circuit, decided August 21, 2001, in *Fidelity National Title Ins. Co. of New York v. National Title Resources, Inc.*, 261 F.3d 758 (8th Cir. 2001). Petitioner reprinted that decision in Petitioners' Appendix at A-53. Fidelity also relies upon the findings contained in the unpublished decisions of the district court that Petitioner reproduced commencing at A-1 and A-12. However, because of the peculiar nature of this case and its unusual procedural history, for ease of reference, Fidelity will briefly elaborate on some of those facts.

National acted as Fidelity's agent for purposes of issuing title insurance pursuant to an Issuing Agency Agreement ("Agency Agreement"). The Agency Agreement permitted Fidelity immediately to terminate the relationship upon one or more delineated events of default, including escrow shortages and failure to remit insurance premiums. A-13 – A-14. After Fidelity discovered shortages in National's escrow accounts and National's failure to pay insurance premiums in late 1994 and early 1995, Fidelity sought and received an agreement (the "March Agreement") from National that it would cover those shortages. Nothing in the March Agreement waived or modified any provision of the Agency Agreement. A-49 – A-52; A-26 – A-27; A-8; A-56.

Fidelity ultimately canceled the Agency Agreement, based on National's continued escrow shortages, its refusal to turn over to Fidelity escrow banking responsibilities, and other violations of the Agency Agreement. A-16. Fidelity then sued National to recover escrow shortages, unpaid premiums, and

damages caused by National's negligence in closing several real estate transactions. A-13, A-15 – A-16. National raised various counterclaims including, at issue here, that Fidelity breached the Agency Agreement by terminating it without notice. A-17.

At trial, the jury found by special verdict, A-17, that National breached the Agency Agreement and that it negligently closed several transactions, and awarded Fidelity damages. It also found that Fidelity breached the Agency Agreement and awarded National damages. A-36 – A-42.

Following trial, Fidelity moved for a new trial. The trial court granted Fidelity's motion, concluding that the jury's verdict that Fidelity improperly terminated the Agency Agreement was against the clear weight of the evidence. A-27. It also ruled that the jury's finding that National breached the Agency Agreement compelled a finding that Fidelity had cause to terminate the Agency Agreement. A-24 – A-26. For these reasons, the district court vacated the jury verdict in favor of National and ordered a new trial on National's counterclaim that Fidelity breached the Agency Agreement. For purposes of the new trial, the district court held that Minnesota law limited National's damages to those it incurred, if any, within 30 days of any breach by Fidelity, since either party could terminate the contract upon 30 days' notice to the other. A-29.

During discovery in preparation for the new trial, National disclosed that it did not intend to offer any new evidence not presented at the first trial. A-7. In that trial, National admitted that its escrow accounts contained shortages, that it commingled Fidelity funds with that of its own, and that it owed Fidelity premiums at the time of

termination of the Agency Agreement. *Id.* National also did not dispute the jury's finding that it negligently closed four real estate transactions. *Id.* Fidelity moved for summary judgment, asserting that those undisputed facts demonstrated that it possessed cause to terminate the Agency Agreement as a matter of law. A-6. The trial court agreed, and granted Fidelity's motion. A-1 – A-11.

A panel for the United States Court of Appeals for the Eighth Circuit unanimously affirmed. A-53. It agreed with the trial court that the undisputed evidence produced at trial, along with National's own admissions, provided Fidelity with cause to terminate the Agency Agreement, and, therefore, that Fidelity did not breach the Agency Agreement by terminating it without advance notice. A-56. It also rejected National's assertion that the March Agreement obligated Fidelity to refrain from terminating the Agency Agreement, or waived Fidelity's rights to terminate the Agency Agreement for defaults committed by National. A-56.

RULE 15.2 STATEMENT

Pursuant to Supreme Court Rule 15.2, Fidelity notes the following misstatements made in the Petition.

National states that Fidelity auditor Paul Hunsinger (not "Huntsinger") "ordered the closing of National's escrow account" in late 1994. Petition at 3, *citing* A-2. Hunsinger did not order National to close its escrow account, and the cited reference does not support this assertion.

National claims that the March Agreement was "[a]n agreement . . . between Fidelity and National regarding all allegations of escrow shortages and nonpayment of

premiums." Petition at 3-5. This claim however is merely a legal conclusion urged by National that neither court below elected to adopt.

National also states that Fidelity "admitted, stipulated and agreed that part of the March 29, Agreement was to forego remedies that it might have at that moment, provided that National lived up to the March 29, Agreement." Petition at 9, 10. In support of this assertion, though, National only cites to a sidebar argument of counsel, and the cited provisions do not contain any admission, stipulation, or agreement. *See* A-64 – A-65.

National asserts that "the jury found that only Fidelity committed post March 29 breaches." Brief at 7. The jury did not make any finding concerning such generalized breaches. Rather, it simply found that Fidelity breached the March Agreement, but awarded National no damages. A-38.

Finally, National claims that the jury concluded that Fidelity wrongfully terminated the "*modified* agency agreement." Petition at 13 (emphasis added). This statement, too, is not true. National did not present any evidence to the jury that the parties modified the Agency Agreement, and the jury never even considered whether the parties modified that agreement. A-36 – A-43.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT MEET THE CRITERIA FOR REVIEW BY THIS COURT.

The foregoing account of the proceedings below makes clear that the outcome of this diversity action rested on the lower courts' case-specific examination of the two relevant contracts and the evidence presented at trial. The Petition does not present any compelling issues requiring this Court's review.

The United States Supreme Court has discretion to grant a writ of certiorari when it concludes that "compelling reasons" exist to warrant review. Rules of the Supreme Court, Rule 10. Although not exhaustive, Rule 10 lists a number of considerations governing the grant of a petition for writ of certiorari. Specifically, the Court may decide to undertake review if:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; or

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Id. Petitioner does not assert that any of these considerations exists.

In an effort, however, to transform the court of appeals' narrow ruling into one worthy of this Court's review, the Petition for Certiorari suggests that the decisions below present issues under the Seventh Amendment, and intimates that the lower courts employed improper standards of review. The record does not support those claims.

A. This Case Does Not Present Any Seventh Amendment Issues.

National contends that the district court violated National's Seventh Amendment right to a jury trial by vacating the jury verdict in its favor and ordering a new trial when "ample evidence" existed to support a verdict in its favor on its counterclaim for breach of contract. Petition at 15. In support of this argument, National points to a number of actions which, it argues, constituted breaches

of the Agency Agreement. *Id.* However, none of the "evidence" National claims the jury relied upon in reaching its verdict related to National's counterclaim that Fidelity improperly *terminated* the Agency Agreement. A-26. National limited its counterclaim for breach of the Agency Agreement to Fidelity's supposed improper termination. A-17. Since National has not pointed to any evidence supporting the claim it argued to the jury – its counterclaim for improper *termination* – its Petition has not presented an issue relating to its right to jury trial.[1]

National also contends that the district court violated its Seventh Amendment rights by improperly removing the issue of damages from the jury. It argues that the court found the verdict against the weight of the evidence only after applying an "incorrect legal standard" limiting National's damages to those incurred within 30 days of a breach. Petition at 16. First, National's argument mischaracterizes the trial court's order. The district court ordered a new trial on damages in the first instance because the $566,000 damage award was "not supported by the evidence," A-28, a conclusion independent of the 30-day rule. The district court's order limiting National to 30 days damages was an "alternative ground" for granting a new trial and was based on settled Minnesota damages law. A-28 – A-29. Thus, National's argument does not raise any Seventh Amendment issues. It simply disagrees with a conclusion of law made by the district court and supported by settled Minnesota law – hardly an issue requiring consideration by this Court.

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1. National argues that the Court of Appeals perpetuated this denial of its Seventh Amendment rights by failing to employ the proper standard of review. This argument is addressed in Section I.B.

B. The Courts Below Employed the Proper Standard of Review.

Although tied closely to its pretended Seventh Amendment claim, National also argues that the Court of Appeals employed an improper standard of review and should have employed a more "searching inquiry" of the trial court judgment. Brief at 11. This argument, too, has nothing to do with the Seventh Amendment and merely criticizes the court of appeals' judgment in, at worst, reviewing the trial court's grant of a new trial for abuse of discretion. This is not an issue compelling this court's attention. *See* Supreme Court Rule 10; *see also* 16B CHARLES A. WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4004.1 (2d ed. 1996). In advancing this argument, National relies on a single opinion of the D.C. Circuit, *District of Columbia v. Tri County Indus., Inc.*, 200 F.3d 836 (D.C. Cir. 2000). National does not claim that this decision conflicts with any other decisions of the courts of appeals and, indeed, implies that the Eighth Circuit has articulated a similar level of review. Petition at 12. Instead, National asserts that review for abuse of discretion, the standard appellate courts employ when reviewing new trial orders, is "unduly narrow" in the case of a new trial order that vacates a jury verdict. *Id.* However, besides advancing a position contrary to established law, this argument is unpersuasive because this case does not present such an issue.

Appellate courts review orders concerning motions for a new trial for abuse of discretion. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 434, 116 S. Ct. 2211, 2223, 135 L. Ed. 2d 659 (1996) (interpreting appellate review of a federal trial court's denial of a motion to set aside a jury's verdict as excessive); *see also Sanford v. Crittenden*

Mem'l Hosp., 141 F.3d 882, 884 (8th Cir. 1998). Thus, had the Eighth Circuit reviewed the district court's new trial order for abuse of discretion, as National charges it did, it would have been entirely within the bounds of its authority.

However, in this matter, it is clear that the court of appeals employed a much higher standard of review. The district court's order granting Fidelity's motion for new trial and its order granting Fidelity's motion for summary judgment in the second trial are necessarily related, given National's failure to produce any additional evidence in support of its claim in the new trial. Consequently, the court of appeals reviewed the entire decision, both the district court's new trial order and its summary judgment order, *de novo*. A-55. The court neither articulated nor appeared to employ any other standard. National's concern, therefore, that the court of appeals conducted too narrow a review is unfounded. National merely presents an abstract issue not relevant to the proceedings below, and certainly not warranting review by this Court. *See* Supreme Court Rule 10; *see also* 16B CHARLES A. WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4004.1 (2d ed. 1996).

Although the Eighth Circuit's apparent *de novo* review of the entire matter below makes this point irrelevant, National's characterization of this Court's holding in *Koon v. United States*, 518 U.S. 81, 116 S. Ct. 2035, 135 L. Ed. 392 (1996) is inaccurate. National cites *Koon* for the proposition that an appellate court must engage in *de novo* review of errors of law. Petition at 16. However, this Court noted in *Koon* that:

> Little turns, however, on whether we label review of this particular question abuse of discretion or *de novo,* for an abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction. A district court by definition abuses its discretion when it makes an error of law. That a departure decision, in an occasional case, may call for a legal determination does not mean, as a consequence, that parts of the review must be labeled *de novo* while other parts are labeled an abuse of discretion. The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.

518 U.S. at 100, 116 S. Ct. at 2047-48 (internal citations omitted). Thus, National's fears that the appellate court would have ignored errors of law had it reviewed for abuse of discretion are unfounded.

National argues that the court of appeals' decision is remarkable for what it did not contain. Petition at 12. Its argument, though, is remarkable for what *it* omits. National suggests that the trial court vacated the jury verdict based solely on the inconsistency of the verdict. *Id.* However, that inconsistency was only one of two independent grounds for the trial court's order. The court's new trial order on the ground that the verdict was contrary to the "great weight of the evidence" stands on its own. A-27. Moreover, National's suggestion that the dissents of Justices Stevens and Marshall in *City of Los Angeles v. Heller*, 475 U.S 796, 106 S. Ct. 1571, 89 L. Ed. 806 (1986) and the First Circuit's opinion in *Skillin v. Kimbal*, 643 F.2d 19, 20 (1st Cir. 1981) required the court of appeals here to employ a more searching inquiry

is not persuasive. First, National never raised the issues those opinions addressed to either court below. Second, neither case dealt with the issue of whether a court of appeals must employ a so-called "more searching inquiry" when reviewing a trial court's grant of new trial. Third, National's argument that somehow Fed. R. Civ. P. 49(a) governing special verdicts like the one returned by the jury in this case has anything to do with the standard the court of appeals must use in reviewing an order for a new trial is not persuasive. One has nothing to do with the other, and none of the cases cited by National connects them. Justice Stevens' dissent, in which Justice Marshall joined, analyzed the four possible responses a trial court may have to an inconsistency in a Rule 49(b) "general" verdict but makes no mention of the appellate standard of review or of a "more searching inquiry." *Skillin* makes a similar analysis, but it, too, fails to address the standard of review advanced by National.

National also argues that the district court violated its Seventh Amendment right to jury trial because the trial court simply disagreed with the verdict. Petition at 14-16. This is rather bizarre given the fact that the trial court, after exhaustive analysis, specifically found that the verdict was against the weight of the evidence, A-23-27.

II. THE COURTS BELOW DECIDED THIS CASE CORRECTLY.

National's chief complaint appears to be that the decisions of the courts below were wrong. However, the courts correctly resolved the issues below.

A. Fidelity Had Cause to Terminate the Agency Agreement.

National's counterclaim against Fidelity alleged that Fidelity breached the Agency Agreement by improperly terminating it without notice or cause. This is the breach National argued to the jury. A-26. However, National did not produce any evidence that Fidelity improperly terminated the agreement. Rather, the uncontroverted evidence at trial demonstrated National's numerous defaults under the Agency Agreement, thus giving Fidelity cause to terminate it. Specifically, National admitted that its accounts contained shortages, that it owed Fidelity premiums it collected from Fidelity insureds, and that it commingled customer and Fidelity funds with its own. A-27, A-49. Thus, the trial court properly vacated the jury verdict finding Fidelity liable for breach of the Agency Agreement.

In discovery for the new trial, National elected to forego any attempt to rectify its deficiencies in proof from the first trial and announced that the evidence it would present on its breach of contract claim would not vary from that it offered at the first trial. A-7. By electing to submit no new evidence in support of its breach of contract claim, National left the district court with an uncontested set of facts demonstrating its defaults under the Agency Agreement, and the court properly found as a matter of law that Fidelity had cause to terminate the Agency Agreement. A-9 – A-10. Based on this record, the court of appeals properly affirmed.

B. The March Agreement Did not Operate to Waive or Modify the Agency Agreement.

National argues that the intent of the parties and whether the March Agreement waived or modified the Agency

Agreement were issues of fact that the court should have reserved for jury trial. Petition at 7-9. However, the construction and effect of a contract raise questions of law that the trial court may determine on summary judgment. *See Opus Corp. v. Intern. Business Machs. Corp.*, 141 F.3d 1261, 1265 (8th Cir. 1998); *see also Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979); *Bell v. Bruen*, 42 U.S. 169 (1843). The Agency Agreement, which provided that Fidelity may terminate it without advance notice upon the event of a default, A-13 – A-14, could not be modified except in writing, A-26. The March Agreement does not contain any mention of a waiver or modification by Fidelity. A-49 – A-51; *see also* A-27, A-8 – A-9, A-56. Therefore, the courts below properly held as a matter of law that the March Agreement did not modify the Agency Agreement.

And although National claims the jury could have inferred a modification or waiver, it never presented evidence that the parties intended to modify the Agency Agreement to the jury, A-27, and the jury did not make any finding on waiver or modification, *see* A-36 – A-42.

C. The District Court Based its New Trial Order on Settled Minnesota Law.

Although National contends that the trial court erred as a matter of law in limiting National's recoverable damages in the new trial to those suffered within 30 days of any breach, Petition at 16, it does not provide any legal support for this assertion. Indeed, it cannot. Under settled Minnesota law, where a contract contains a provision for termination upon notice, recovery of future profits based on a breach of that provision is limited to the specified notice term.

In re Petroleum Carriers Co., 121 F. Supp. 520, 525-27 (D. Minn. 1954); *Western Oil & Fuel Co. v. Kemp*, 245 F.2d 633, 641 (8th Cir. 1957). Since, in this case, either party could terminate the Agency Agreement upon 30 days' notice to the other party, the trial court properly limited National's damages to those it suffered within 30 days of any breach.

CONCLUSION

The petition for a writ of certiorari should be denied.

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